

# Handbook on Access to Justice under the Aarhus Convention



THE REGIONAL ENVIRONMENTAL CENTER  
*for Central and Eastern Europe*



# Handbook on Access to Justice under the Aarhus Convention

Edited by  
**Stephen Stec**

SZENTENDRE, HUNGARY  
**MARCH 2003**

Ministry of the Environment  
Republic of Estonia



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ISBN: 963 9424 28 5

Published by:  
The Regional Environmental Center for Central and Eastern Europe  
Ady Endre ut 9-11, 2000 Szentendre, Hungary  
Tel: (36-26) 504-000, Fax: (36-26) 311-294, E-mail: [info@rec.org](mailto:info@rec.org), Web site: [www.rec.org](http://www.rec.org)

Printed in Hungary by ProTertia

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# Explanatory note

The *Handbook on Access to Justice under the Aarhus Convention* was developed by the Regional Environmental Center for Central and Eastern Europe (REC) with the participation of the following partner organisations: the American Bar Association/Central European and Eurasian Law Initiative (ABA/CEELI), European ECO Forum, the Environmental Law Association of Central and Eastern Europe and the Newly Independent States (Guta Association) and the Environmental Law Alliance Worldwide (ELAW). Project funding was provided by the government of the United Kingdom. Additional financial support, including the translation of a first draft of the handbook into Russian, was provided by ABA/CEELI. A project Steering Committee was formed to support the handbook's development. Steering Committee membership was open to all UNECE member states, as well as representatives of partner organisations, the REC and the UNECE Secretariat. The countries that participated in the Steering Committee included Bulgaria, Denmark, Estonia, Finland, the Netherlands and the United Kingdom.

The development of the handbook was designed with a practical approach in mind, making use of actual cases as far as possible. It drew upon the experience of a good practice handbook on *Public Participation in Making Local Environmental Decisions* developed during a workshop in Newcastle, UK (December 1999). Cases were generated in several ways. Most were developed after announcements sent through existing networks, primarily the network of government Aarhus focal points, and networks and databases of public interest environmental lawyers. A number of cases from Central Europe and the

EECCA region were generated through a Sub-Regional Case Study Development Meeting, held in Lviv, Ukraine, June 4-5, 2001. Finally, several cases were identified through research by the authors. The information in the case studies is current as of July 2002. Further details concerning the case studies can be found at the beginning of Part III of the handbook.

The handbook also contains analytical contributions (Parts I and II). The framework for these parts was developed through numerous consultations involving the Steering Committee. An important reference for the framework was the report on *Complaint Procedures and Access to Justice for Citizens and NGOs in the Field of the Environment within the European Union*, discussed at the EU-IMPEL Workshop held in the Hague, the Netherlands (May 2000).<sup>2</sup> While not covering all aspects of access to justice under the Aarhus Convention, the analytical parts treat some of the more significant issues, as identified during the Hague workshop, the Sub-Regional Case Study Development Meeting, and in other relevant consultations. Parts of the text draw from *The Aarhus Convention: An Implementation Guide* (UN: Geneva and New York, 2000). Further work certainly needs to be done. It is our hope that this document will contribute to future collaboration to develop the state of the art of access to justice in environmental matters in the UNECE region.

Finally, this handbook is meant to expand and evolve over time. It will be included on the official websites of the Aarhus Convention, <[www.unece.org/env/pp/a.to.j.htm](http://www.unece.org/env/pp/a.to.j.htm)>, and of the REC, <[www.rec.org](http://www.rec.org)>, and additional cases and updates will be posted periodically.



# Preface

Rita Annus,  
Chairperson of the Task Force on Access to Justice

It has given me great pleasure to lead, on behalf of Estonia, the Task Force on Access to Justice that was set up by the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) at its Second Meeting of Signatories in Croatia in 2000.

It was agreed that the Task Force should focus on practical implementation means such as pilot projects and measures to remove financial obstacles to those seeking access to justice, as well as considerations of assistance mechanisms, rather than to engage in efforts to extend or refine the legal framework provided by the Convention. It should gather information on good practices and provide a forum for the exchange of experience. An effort should be made to provide models, concrete solutions and problem-solving approaches to the implementation of article 9. It was agreed that representatives of ministries of Justice should be invited to participate.<sup>1</sup>

The Task Force convened a number of fairly informal discussions, including two in Geneva. The Regional Environmental Center for Central and Eastern Europe (REC) was commissioned to produce this handbook, and began by gathering case studies that shed light on the ways in which the provisions of article 9 could be implemented, and on some of the potential pitfalls and obstacles that have been encountered. The REC was assisted by support from the European ECO Forum, the American Bar Association/Central European and Eurasian Law Initiative (ABA/CEELI), the Environmental Law Association of Central and Eastern Europe and the Newly Independent States (Guta Association) and the Environmental Law Alliance Worldwide (ELAW). A preliminary meeting was held in Lviv, Ukraine, in June 2001 to review the collection of material.

Estonia hosted a workshop in Tallinn in September 2001, posing a series of questions that emerged from earlier discussions as a basis for this work:

- What might constitute an “independent and impartial body established by law?”

- What is “sufficient interest” and how does this relate to the standing and status of non-governmental organisations (NGOs) and other community neighbourhood groups?
- What are adequate and effective remedies?
- How can injunctive relief be used to assist with effective remedies?
- How can appropriate financial assistance be provided in an effective way?
- What other barriers to justice have been identified and how have they been overcome?

The workshop was a great success. It was attended by 52 participants, acting in their personal capacity, from a wide range of government institutions and NGOs. Its aim was to focus on good practice and provide a forum for the exchange of practical experience.

Discussions took place in groups, each facilitated by one of the participants, and the conclusions of the groups were broken down according to articles of the Aarhus Convention. Categories used were: procedures; remedies; review bodies and other bodies; overcoming financial barriers; overcoming other barriers; and other issues not addressed in other sessions.

It became clear during the course of discussions that because of the wide geographical range of the United Nations, the contexts in which access to justice under the Aarhus Convention needs to operate are diverse in terms of legal and democratic traditions, as well as social, cultural and economic conditions. This diversity needs to be remembered particularly when reading the case studies in Part III of this handbook. An attempt was made to ensure that different practices are adequately described throughout, but it is accepted that these case studies do not cover all good practices on environmental justice.

Throughout all our discussions it was clear that what was needed was practical guidance and support rather

than academic or theoretical studies. Inevitably perhaps, participants pressed for more things to be done than was possible in the time available. We were asked, for example, to make efforts to ensure that all good practices identified during the course of discussions were adequately described in the final version of the handbook. These included some excellent examples of review bodies, time-frames, standing, citizen enforcement powers, injunctive and interim relief, damages, legal aid schemes, waiving fees and financial certainty. Following these up will undoubtedly be valuable and provide parties to the Convention with a wealth of the best concrete solutions to a range of the most practical problems encountered when implementing article 9 of the Convention. The workshop also concluded that, while this handbook would be mainly addressed to government officials and others involved in the implementation of the Convention, it would be important for future Task Force activities to assess and address the needs of other target groups such as the public, lawyers and judges.

I am very pleased to present this *Handbook on Access to Justice under the Aarhus Convention*. It does not claim to be the final and definitive word on all aspects of the implementation of the justice provisions in the Convention. However, I hope that this is a good start and that its focus on real cases, real problems and real solutions will make it an excellent resource for parties to the Convention and others seeking to meet the requirements of article 9.

The handbook is organised as follows:

- Part I: Analytical chapters elaborating specific issues of access to justice under the Aarhus Convention as discussed in Tallinn and illustrated by case studies in Part III.
- Part II: Some other issues related to access to justice in the context of the Aarhus Convention.
- Part III: Case studies chosen to illustrate issues that arise in implementing article 9 of the Convention.

I would like to conclude by thanking those who have helped to make the Estonian leadership of the Access to Justice Task Force a success, and to all those who have contributed so generously to the handbook.

I also want to take this opportunity to welcome the government of Belgium, which now leads the new Access to Justice Task Force established during the First Meeting of Parties to the Aarhus Convention in Lucca in October 2002. I wish them every success with this continuing work.

Rita Annus  
Director-General, Legal Department  
Ministry of Environment  
Estonia



# Acknowledgements

Rita Annus, Jayne Boys, Sofie Flensburg, Cairo Robb, Vera Rodenhoff and Rachel Solomon-Williams provided valuable comments on the text. Merab Barbakadze, Olga Razbash, Joost Rutteman and Jeffrey Thomas gave valuable input to Part I, chapters 6 and 7. Linda Nowlan and Chris Tollefson provided information on strategic lawsuits against public participation (SLAPPs) in Canada. Kate Cook and Peter Roderick supplied background materials relating to UK cases. John E. Bonine collected most of the citizen guides in Appendix C. Jeffrey Thomas pre-edited the case studies. Special thanks are due to the staff at Ecopravo-Lviv for local organisation of the Sub-regional Case Study Development Meeting in Lviv, Ukraine, in June 2001. Translators for the Russian edition were Marina Aidova and Marina Lazo. Additional translation was provided by

Natasha Chumachenko, Andriy Kondratyev, Tanya Krivitska, Dmitry Zhdan and Anna Zinchenko. The REC team was led by Stephen Stec and included Marianna Bolshakova, Tsvetelina Borissova, Eniko Horvath, Dana Romanescu, Orsolya Szalasi and Magdolna Toth Nagy. Administrative and technical support was provided by Liljana Antonovska, Tinatin Kvatchantiradze, Balazs Ruzsa and Pavel Steiner. Thanks are due to Steve Graning, Sylvia Magyar, Eunice Reyneke and Greg Spencer of the REC Communications and Publications Department who edited and proofread the text and did the layout. While too numerous to mention by name, those who provided materials, facilitated contacts and gave other important forms of support to the handbook project are gratefully acknowledged for their key contributions.



# Introduction

Stephen Stec

“Today we may speak just about the general principles of access to justice in this or that country and compare the experience of different countries. [O]ne may speak only about development of the processes of democratisation in court practice of countries [in terms of] application of the principles of the Aarhus Convention [and the] creation of possibilities.”

*(Statement by the Kazakhstan focal point for the Aarhus Convention in a note accompanying the submission of cases.)*

This statement summarises the purpose of this handbook — to look at possibilities in the field of applying the access to justice principles of the Aarhus Convention, as expressed through real cases drawn from the UNECE region.

The approach of this handbook is to use cases to illustrate the obligations of the Aarhus Convention and how they might be enforced or upheld through complaints procedures and other means of access to justice. In dealing with issues such as the rules with respect to broader standing, and the application of those rules in particular circumstances, it is hoped that parties to the Convention will consider different options in the adoption of implementing legislation and in the development of rules of court and rules of practice of other tribunals and similar bodies. It is hoped that an exchange will be fostered resulting in the development and broad adoption of best practices in the field of access to justice in environmental matters in the UNECE region.

The first part of the handbook discusses specific issues with respect to the implementation of the access to justice obligations of the Convention, drawing upon, analysing and evaluating the results of the case studies as much as possible. While an attempt was made to identify case studies dealing with as many of the aspects of access to justice in relation to the Aarhus Convention as possible, not all such aspects could be covered by practical case examples. Thus, the analysis also relies upon the authors' research and sometimes direct experience.

## Case studies

Whereas environmental cases were virtually unheard of a generation ago, courts and administrative tribunals are today increasingly hearing environmental cases. While some may say that more appeals from unsatisfactory decisions indicate poorer decision-making, the root cause would rather appear to be simply the large increase in opportunities to access information, participate, and gain access to justice. Whether courts, administrative appeals, or other possible access to justice mechanisms are considered, three aspects of access to justice need to be examined. The first is a threshold issue — under what circumstances does a person have standing to invoke substantive and procedural guarantees? The second is the question of which specific procedures and remedies should be available once the threshold is crossed. The third is the extent of judicial control through the procedures available, also referred to as the standard of review.

The UNECE region covers many legal traditions. Those countries that require subjective rights to be impaired prior to resort to judicial remedies may be reluctant to recognise the rights of some, for example, environmental organisations. Other countries with more idealistic but less strictly implemented legal traditions may have no trouble recognising broad concepts of rights and interests. But such recognition may result in a less strict application of norms and remedies in a given case. Exchanges of experience on access to justice help bring these strands together — on the one hand, extending spheres of recognised rights and interests into heretofore uncharted territories and, on the other hand, requiring idealistic “rights” to be taken more seriously. The result is to extend the scope of the law over citizen-state interaction and to reduce the scope of government action without criticism and oversight.

Crossing the threshold is just the first step. The procedures and remedies available depend on a plethora of circumstantial and legal factors that differ substantially in the various countries. The length of proceedings and lack of

information about access to justice are examples. The effectiveness of access to justice procedures is heavily influenced by the availability of interim measures and the possibility to secure the status quo or prevent the continuation of certain activities during the proceedings (see also chapter 6 on injunctions). Otherwise the environment may be long lost even though the case is won. Perhaps the largest obstacles are financial. These include not only the obligation to provide financial security for procedural costs, but also the prospect of civil lawsuits claiming damages for losses incurred if projects are halted during the proceedings.

The scope or extent of judicial control also differs greatly from country to country. This scope can be viewed in terms of both breadth and depth of inquiry. Breadth of inquiry refers to the question of which laws are taken into consideration when reviewing the legality of the challenged act. By depth of inquiry, the intensity of judicial review is considered in comparison with the margin of discretion granted to the administrative authorities when making their decisions, and the level of detail of facts reviewed.

In practice, some countries like Italy and Germany have fairly restrictive conditions regarding standing. They require the applicant to prove that he or she has an enforceable right to lawful administrative action or to assert that the law he or she invokes is specifically aimed at his or her protection. However, once this hurdle is passed, the procedures and tools available to protect the environment may be very effective and the extent of judicial control rather wide. In Germany, for example, the commencement of administrative review procedures automatically has the effect of an order maintaining the status quo, and the extent of judicial control in both Germany and Italy is generally very broad. It is often the case that countries with a low threshold for standing, such as France, where it is sufficient to assert a legal, factual or even idealistic interest, often have a more limited extent of judicial control.<sup>3</sup> Still other countries may have broad standing rules, but financial barriers may lead to few persons taking advantage of them. Thus when looking at access to justice in different countries it is important not to focus on one single issue such as standing, but to consider all aspects of each country's legal system, including circumstantial factors. In doing so, efforts to address barriers to access to justice can be tailored to the specific situation in each country.

These concepts have special relevance in a large part of the UNECE region that has gone through a decade of transition from centrally planned economies and information, and social control, to transitional or market economies with greater pluralism. Inadequacies in the system of administrative and judicial review come to the fore quite readily in environmental protection, due to the higher level of civic activism. As obstacles are encountered resort is given to mechanisms for the administration of justice, an occurrence that is becoming more frequent. Ultimately, the

call for access to justice shows the interest of the public in trying to protect the environment, preferably but not necessarily in partnership with the authorities.

The fact that the elements of standing and judicial control are central to access to justice under the Aarhus Convention is further evidence, if any is needed, of the extent to which environmental protection serves as a motivation for persons to use the law or to define rights, and how it helps to promote and uphold the rule of law. Moreover, through resort to the courts, the power and independence of the judiciary are tested. The focus on justice in the growing body of international environmental law is another indication of the role of environmental protection in empowering people and making authorities more accountable. Where citizens fight for environmental justice in access to information or the right to take part in decision-making, they increase their ability to make use of the same mechanisms for other purposes.

Access to environmental justice is one of the major issues on the international agenda. The relationship of access to environmental justice and good governance to sustainable development is becoming increasingly apparent. While the notion that environmental protection and development are inseparable has been accepted for some time,<sup>4</sup> the connection between access to environmental justice and governance is a relatively new idea. It is further evidence of the special characteristics of international environmental law,<sup>5</sup> and its application in other areas of domestic and international law, especially in the contexts of human rights, sustainable development and intergenerational equity.<sup>6</sup> Access to justice in national practice and under the Aarhus Convention will undoubtedly prove to be major drivers in the development of environmental governance and the law of sustainable development on domestic and international levels.

The cases generated for inclusion in this handbook cover a wide range of problems and solutions relating to access to justice within the framework of the Aarhus Convention. Of course, these cases cannot actually be regarded as examples of access to justice under the Convention, as most of them predate the Convention's coming into force in October 2001. They deal with complaints and disputes arising out of the handling of information requests (article 9(1)), the substance and procedure of environmental decision-making and other matters (article 9(2)), and attempts by members of the public to use various legal tools to enforce environmental law (article 9(3)) (see Keyword index to cases). They also deal with the kinds of matters that might be referred to as administration of justice — that is, the minimum standards for due process that are covered by article 9(4), including the availability and enforcement of full and effective remedies, reducing costs and eliminating other financial barriers to access to justice, and limiting the misuse of legal process. Specific lessons that can be learned from the case studies in con-

nection with these provisions are drawn out in the following chapters. Part II contains several additional chapters on issues related to access to justice, including the right to a healthy environment and examples from the practice of the European Court of Human Rights and the North American Agreement on Environmental Cooperation.



# Part I

## Specific Access to Justice Issues Under the Aarhus Convention





# Chapter 1

## Access to justice in cases involving access to environmental information

Remo Savoia and Dmitry Skrylnikov

According to article 9(1) of the Aarhus Convention:

“Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.”

### Failure to respond to an information request

The failure of a public authority to respond to a request for information is common in many countries.<sup>7</sup> Denying access to information impacts upon an essential aspect of participatory democracy. When public authorities hold information on the environment and do not provide it upon request, they disregard not only the information principle, but also the participation principle. Lack of access to information on environmental matters is a considerable obstacle to effective public participation.

In many cases, after initially denying access to the requested information, public authorities may decide to provide it “voluntarily” following the initiation of a court procedure, but prior to the court’s ruling, perhaps to avoid a court judgement going against them. This is illustrated in Hungary Case 2 (the Metal Plant Case) where a member of the public requested information from a public authority on emissions data for an enterprise. The Environmental

Inspectorate of Northern Hungary first refused to provide the data on air pollution and noise emissions of this enterprise on the grounds that the citizen had no right to participate in any government decisions relating to the enterprise. The individual in question filed a lawsuit at the local City Court of Miskolc to oblige the inspectorate to provide access to the requested information. During the process the inspectorate “voluntarily” released a part of the requested data. While a final court judgement was avoided, in the view of one of the authors of the case study, the case proves that “the group of those who are entitled to have access to environmental data of a facility is not limited to the group of those who have standing in a particular case, which is the main idea behind public access to environmental information.”

Another interesting case demonstrating a successful resolution where information was voluntarily released is the Salisbury Bypass Case in the UK (see appendix B). The Department of Transport refused to deliver a copy of an “induced traffic assessment report” to Friends of the Earth, arguing that the requested information was not related to the environment according to both the provisions of Directive 90/313/EEC<sup>8</sup> and the UK’s domestic legislation. Friends of the Earth brought a case for judicial review of the department’s decision, and two weeks before the court hearing was due, the department provided Friends of the Earth with a copy of the report.

In some countries the obligation to provide information and the grounds for possible refusal are laid down in legislation. For example, in Hungary the public authority holding requested information must justify the legality of any refusal, and an appeal may be instituted against the authority refusing to issue the information requested within 30 days from the communication of the refusal (Act no. 63 of 1992 on Freedom of Information of Public Interest). Almost the same provisions exist in Ukraine, where, according to the Law on Information, the burden of proving the legality of any refusal is placed on the authority. If refusal is legally groundless or the information is not pro-

vided in time, the court is obliged to impose penalties on the responsible authority.

The Aarhus Convention sets up a general time limit for public authorities to make information available.<sup>9</sup> The requested information must be released “as soon as possible and at the latest within one month.” Consequently, when the requested information is not released in time or is released after the time limit has expired there is a failure to respond by the public authority.<sup>10</sup>

The Convention provides for the possibility to extend this time limit to two months when the volume and complexity of the information justify such an extension, but as Germany Case 5 (the Baltic Sea Motorway Case) shows, an extended time limit should not be used as an excuse not to release information promptly. In this case involving the EU Access to Environmental Information Directive, authorities in the state of Schleswig-Holstein interpreted the two-month delay for responding to an information request as applicable to a formal response (i.e. a simple acknowledgment), rather than a substantive response. After attempts to change this interpretation failed on the national level, a complaint was made to the European Commission. The Commission’s interpretation differed from that of the German authorities, and it appealed to the European Court of Justice in 1999 against the failure of the German authorities to respect the directive in practice.<sup>11</sup>

Concerning good practices for preliminary reconsideration and administrative review procedures in cases where access to information is denied, the question of timeframes should be considered. The obligation of the European Parliament, Council and Commission to reconsider internally an application for access to information within 15 days of the submission of a complaint (confirmative application) is considered to be good practice. Furthermore, a number of countries have a one-month timeframe for administrative (non-judicial) reviews in general — this is the case in the Czech Republic, Estonia, FYR Macedonia and some other countries.

In terms of judicial review, six months from making an appeal to the judicial system until the final decision by the court, as is the target in England and Wales, seems to be a good example of a timely judicial procedure. A good practice would be to reduce deadlines for refusal of information to allow the applicant to proceed with the complaint, or to appeal as soon as possible to the next instance.

The Constitution of Ukraine provides for a quick judicial review procedure, which allows citizens to appeal directly to the court on the grounds of a violation of their rights. This procedure was developed to overcome the bureaucratic delays during the administrative process of the past regimes. As practice shows in Ukraine, the process of judicial review in such cases is not expensive and takes from one to three months, while pre-judicial, administrative processes can only extend the process of getting information one or several months more.

## Incomplete response

An incomplete response can be considered as a sub-category of “failure to respond.” In fact, in such an event, the public authority releases only a part of the requested information. A synonym for “incomplete response” is “unsatisfactory response,” as underlined in Ukraine Case 1 (the Ukrainian Right to Know Case). In this case, a citizen expressed concern over the construction of a petrol filling station and asked the Oblast Chief Sanitary Doctor to provide information about its activities. In particular, he demanded an assessment and forecast of health indices for Khmelnytsky residents and the results of laboratory research on air pollution. He received an unsatisfactory answer to his request. In fact, the doctor did not provide any information on the essence of the matter. The court declared the actions of the doctor illegal and obliged him to satisfy the inquiry.

This case shows that, although it is generally difficult for citizens and community organisations to obtain requested environmental information from officials, they can defend their entitlement to access to environmental information in court through a juridical procedure.

## Challenges to claims of exemption

Each country makes use of certain exemptions from the general rule of access to environmental information.<sup>12</sup> A number of these exemptions are common to all countries, but there are also differences between countries. Some jurisdictions distinguish between mandatory exemptions (the public authority *must* withhold the information) and discretionary exemptions (the public authority *may* withhold the information).

Exempt categories common to virtually all countries, and also mentioned in the Aarhus Convention,<sup>13</sup> include the following:

- national defence;
- public security;
- international relations;
- commercial confidentiality;
- ongoing court proceedings or criminal and other investigations;
- personal privacy; and
- intellectual property rights.

Depending on how these categories are applied and what other restrictions are in place, authorities have the potential to limit substantially the transparency that laws on access to information are supposed to ensure. As shown in all three Spanish cases, the public authority con-

sistently justified its refusal to give the requested information by claiming that the information was included in draft documents or data, or in internal communications.

The appeal to the European Ombudsman<sup>14</sup> by Friends of the Earth (see appendix B) is a prime example of how authorities may sometimes use exemptions to impede access to information. In this case, the NGO asked the European Commission (DG XI — now DG Environment) for copies of two studies conducted for the Commission on the UK's transposition of the Habitats Directive and various waste directives. The Commission provided copies of the studies, but lines were blacked out with thick ink on page after page, on the grounds of “protection of the public interest (court proceedings, inspections and investigations).” The NGO appealed to the Secretary-General of the Commission. After a negative decision, Friends of the Earth decided to appeal to the European Ombudsman against these refusals. The ombudsman stated that the exemption referring to inspections and investigations should only be applied when the requested documents were drawn up in the course of an investigation connected to an infringement proceeding. Therefore, the ombudsman ruled that the Commission was guilty of maladministration in refusing to provide full copies of the reports.

As a general rule, the Aarhus Convention requires that exemptions are interpreted in a restrictive way. The Friends of the Earth case illustrates that judicial or other similar bodies will take a hard look at the way in which authorities seek to interpret exemptions to disclosure, and will invalidate administrative acts (or issue opinions with similar effect) when the authorities make interpretations that are too broad.

A category of exemptions derived from the definition of state secrets can be found in the national legislation of virtually every country. This usually includes information that, if released, could adversely affect or endanger national security, public security or public order, international relations, important economic interests, or national monetary and currency policy.<sup>15</sup> Russia Case 2 (the Nikitin Case) deals with the issue of state secrets and access to information. A private person was arrested and charged with treason through espionage for having allegedly handed over state secrets to a foreign organisation. After a long trial, the court decided to acquit him of the charge of treason. The court based its decision in part on article 29(4) of the Russian Constitution, which states that each person has the right freely to seek, receive, pass on, produce and disseminate information by any legal method. This constitutional provision was elaborated in the Law of the Russian

Federation on Mass Media. In examining the right to information, the court took into consideration another requirement of the Russian Constitution that the list of information on state secrets shall be determined by federal law. The court stated that the information disclosed by Nikitin fell into the category of information on ecological conditions (accidents and catastrophes endangering the safety and health of citizens, and their consequences) and, according to the law, this information could therefore not be considered as secret.

Most countries have an exemption for commercially confidential information. In certain cases, this exemption is used in a very broad way to suppress any information connected with business. However, the exemption is sometimes restricted when such information concerns impacts on the environment, as in Slovenia, or is related to pollution, as in Hungary.

In the UK case of *R v. Sec of State for the Environment, Transport and the Regions and Midland Expressway Ltd.* (see appendix B), the issue was whether a document — in this case an agreement for the construction of a toll-financed road scheme — fell under the exemption of commercial confidentiality. The court decided that the agreement to construct the road was “information relating to the environment,” and the fact that a document might contain confidential information that is truly commercial could not be used to prevent disclosure of the main body of the agreement. Moreover, the purpose of seeking the information was irrelevant. This case illustrates that courts will examine the determinations made by public authorities with respect to confidentiality and will require public authorities to apply exemptions restrictively. In this case, the information that was confidential could not be used to justify the refusal to disclose other information that could be separated from the confidential information.

The case on pesticides and genetically modified crops (see appendix B) again illustrates that public bodies may attempt to use several arguments — here commercial confidentiality — to prevent making information available. The former Ministry of Agriculture, Fishery and Foods refused to specify what tests had been conducted on genetically modified crops. As stated in EC Directive 91/414/EEC concerning the placing of plant protection products on the market, confidentiality shall not apply to a summary of the results of tests to establish the efficacy and harmlessness of the substance or product to humans, animals, plants and the environment. Thus, the court ruled that the information had to be disclosed.



# Chapter 2

## Access to justice in cases involving public participation in decision-making

Svitlana Kravchenko, Dmitry Skrylnikov and John E. Bonine

Article 9(2) of the Aarhus Convention requires that:

“Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.”

This chapter deals with access to justice in examples of alleged violations of both procedural and substantive types.

In the United States and Western Europe, courts issue rulings more often about *procedural* illegality than about substantive decision-making.<sup>16</sup> In part this is because there is rarely any substantive legal question about government action, because laws are written to give a government broad discretion. A legislative term like “protect the environment” or “prevent harm” may sound like a standard for substantive legality, but such a term, as an American judge once wrote about a forest statute, “breathes discretion through its every pore.”<sup>17</sup> On the other hand, there is a general reluctance by courts in some countries to stop a big, important project on procedural grounds.<sup>18</sup> In most of the countries of Eastern Europe, the Caucasus and Central Asia (EECCA), a court makes a decision usually on the basis of substantive legality. If a procedure has not been respected, the courts are not yet comfortable with ruling against governments on what they consider “technical” matters.

### Judicial challenges to procedural illegality

An examination of article 6 of the Aarhus Convention shows several procedural requirements that could become the subject of a lawsuit or other appeal:

- failure to provide access “to all information relevant to the decision-making” process, including data, a non-technical summary and alternatives;
- failure to provide early, timely and effective public notice;
- failure of the public notice to be clear about the activity, possible decisions and the public authority responsible;
- failure to provide notice of the procedure, including participation opportunities, where information can be obtained, and the nature of the information;
- failure to provide an opportunity to submit comments, or failure of the authority to take due account of comments; and
- failure to inform the public (and to do so timely) of the final decision “along with the reasons and considerations on which the decision is based.”

These six requirements can be grouped into three categories of procedural errors:

- failure to disclose all information to the public relevant to its participation;
- improper procedures for public participation, such as timely or adequate notice, opportunity to comment, timeframes, restrictions on “administrative standing,” or other conditions; and
- inadequate response to comments received (failure to take due account), or failure to reveal the reasons or considerations for the decision.

It is likely to be easier to get judicial correction of some categories of violations than of others. Regarding disclosure, it appears to be difficult to persuade a judge that undisclosed information was relevant to the decision-making process. The second — improper participation proce-

dures — asks courts to do the kind of work that is most familiar to them. If a member of the public can show that procedures were violated, courts can rule in their favour, without thinking that they are making policy decisions themselves about the environment. The third is the most difficult: to ask a court to determine that the government inadequately responded to a particular comment, or inadequately explained its reasons, requires the court to make a somewhat subjective judgement rather than a clear judgement about legal procedures. This is not to say that it is wrong for the court to do this. It is simply observed that judges may be reluctant to rule in such cases.

### Justice regarding non-disclosure of documentation for participation in decision-making

It is a basic principle of public participation that all documentation and information relevant to a proposed decision should be open for examination by the public concerned. Article 6(2)d) of the Aarhus Convention requires that a proponent/applicant or public authority responsible for decision-making must notify the public concerned about public participation procedures, including “the public authority from which information can be obtained and where the relevant information has been deposited for examination by the public.” This special aspect of “access to information” is similar to, but somewhat different from the more general access to information principles under article 5 of the Convention. In this special case, denying access to information not only harms the information principle, but also the participation principle.

Information relating to proposed decisions must be available, according to article 6(2), “early in an environmental decision-making procedure,” when all possibilities and alternatives are open for consideration. This gives the public a chance to be prepared and to participate effectively. Furthermore, the information must be available “in an adequate, timely and effective manner.” Lack of access to documentation can make public participation ineffective or even impossible.

The question of the availability of documentation may be easy or difficult for a court to rule on. On the one hand, it is easy to rule that documents should be provided. This seems basically procedural and a purely legal issue. Such cases have become rather usual in court practice. On the other hand, to rule that the absence of a document affected the decision-making process may be more difficult for a court to deal with. Some of the cases included in this handbook illustrate these problems.

In Armenia Case 1 (the Victory Park Case), the construction of a hotel complex started in a public park without an environmental impact assessment (EIA). When citizens saw trees being cut, the Environmental Public Advocacy Centre (EPAC) tried to obtain information about the project from the city. It asked whether an EIA existed,

whether any hearings had been held, and whether the mayor of the city had given permission. But access to the requested information was refused. Informally, EPAC discovered that the mayor of the city had given permission to start the construction, provided that an EIA first made a positive conclusion. EPAC also discovered that, despite this condition, and despite the absence of an EIA, the general architect of the city made another order to start the construction two days later.

The court dismissed EPAC's case, never addressing its demand for information. EPAC also sued the prime minister for failing to provide information, but the court proceedings were delayed, and again no injunction was issued to stop the ongoing construction. This case is also an example of the lack of opportunities for participation in EIA or *expertisa* (see section on Participation rights and *expertisa*).

In Germany Case 2 (the Experts' Documents Case) on the construction of a new and extended section of railway track between Erfurt and Leipzig/Halle, the courts were more attentive to citizen participation rights. A nature conservation association recognised under federal law, NABU Landesverband Sachsen-Anhalt (NABU), requested access to various documents in order to comment on the proposal. These included, in particular, an expert report by the planning office referring to a survey of the nature aspects of the surrounding countryside. The public authority rejected the NABU application to view the files. NABU sued. The court ruled that the defendant public authority had infringed the plaintiff's participatory rights. The court rejected an argument by the defendant that, under the Administrative Procedure Act, the denial of access to documentation was an insubstantial procedural error and therefore could not affect the legality of the development consent. The court ruled that the Nature Conservation Act gave a right of consultation of independent weight and absolute character. This is an important statement, showing that access and participation rights under more recently promulgated environmental laws have to be treated seriously.

Not all cases in Germany are this successful. Germany Case 5 (the Baltic Sea Motorway Case) involved the question whether documents were made available adequately to allow public participation to occur properly. The recognised conservation group, Bund für Umwelt und Naturschutz (BUND) and the regional group Schleswig Holstein Association opposed the construction of a subsection of the A20 motorway, the so-called Baltic Sea motorway. During the procedure to approve the plan, a controversy arose about the extent of legal protection for the Wakenitz valley. Since the conflict between the authority and BUND could not be resolved, BUND filed a case against the project.

The association made procedural and substantive legal arguments in its suit. Procedurally, the association complained that important documents were not made completely accessible. The plan approval authority



refused the inspection of the requested documents during the hearing procedure. The authority furthermore modified the documents several times, without allowing BUND to comment again.

The court ruled that BUND could only challenge substantive violations of the nature protection law, and not violations of other laws, and apparently not procedural inadequacies such as the failure to provide information. Yet, adherence to proper procedures and the ability to challenge violations in the courts are fundamental to both the rule of law and the implementation of the principles of the Aarhus Convention.

### Justice in events of improper procedures for public participation

According to article 6 of the Aarhus Convention, public notification about a decision on specific activities should be given early in the process and should be adequate, timely and effective. Public participation should be real, not just a formality. There should be a clear procedure for the public to make comments and proposals and give information or opinions in writing or during hearings. When these procedural conditions are not met, access to justice should be available to require correction.

### Access to justice related to requirements for “administrative standing”

The system of prerequisites or qualifications to the right to participate is sometimes termed “administrative standing.” From another point of view, this can be called the “right to participate.”

In the cases submitted by NGOs and governments for this handbook, restrictions on the ability of the public or NGOs to challenge decisions through *administrative* proceedings seem to be just as common as restrictions on their ability to go to court. In Hungary Case 1 (the Balaton Highway Case), the Somogy Nature Conservation Organisation challenged a permit but was refused “administrative” standing by the Ministry of Transport, Telecommunications and Water Management. In Poland Case 1 (the Highway and Housing Case), public authorities argued against allowing residents to participate in administrative appeals about a highway for some time, but eventually relented. In Slovakia and the Czech Republic, NGOs or ordinary citizens are being prevented from participation in administrative procedures, such as forest planning, as has been reported for a long time.

A participant in an administrative proceeding has the right, in many countries, to take an unsatisfactory decision to court for a legal review afterwards. Conversely, prior participation is sometimes a prerequisite to judicial challenge. The result of denying citizens or NGOs to participate during the administrative stage, therefore, may be to prevent them from challenging illegal actions later in court, on the basis that they did not participate earlier.

By keeping the public or NGOs out of public participation procedures in the first place, an opportunity may be lost for the judicial system or an equivalent, independent body to rectify violations of procedure or substance. Therefore, blocking participation at the administrative level also blocks independent judicial review of non-compliance with laws by public authorities.

### Participation rights in EIA and expertiza

The main and most powerful tools for public participation in decision-making are EIAs and “environmental expertiza.”<sup>19</sup> In EECCA countries, a combination of EIA and expertise is used. Relevant laws have provisions on public participation and public hearings, but they are declarative. Special regulations are needed to enforce them. Countries ratifying the Aarhus Convention without having procedural regulations will have to establish such regulations in national legislation to comply with the Convention.

It is often the case in the EECCA region that, even where procedural regulations do exist, violations are not taken seriously into account by courts. This practice leads to a situation where investors and sometimes even government authorities knowingly violate procedural requirements. Sometimes, however, courts are willing to enforce procedural requirements. In a precedent in Ukraine, the first instance court found the positive conclusion of the state ecological expertise invalid in the Mineral Fertilizers Terminal project mainly because of violations of procedural requirements, including the public’s right to be informed and to participate in the expertise process.<sup>20</sup>

### Other examples involving the denial of participatory rights

Germany Case 2 (the Experts’ Documents Case) illustrates another issue that arises in access to justice in environmental decision-making — defence of the rights of the public to participate when important changes are made to a proposal. Substantial amendments to the project affected more than 50 percent of the total land area. Although the project planners had made amendments to the planning documents laid out for public inspection in order to counteract the objections of the public concerned, the public had no real chance to express its opinion on the new proposal. The amended planning documents were sent to the relevant authorities and private individuals who would be affected by the amendments. They had been asked to submit their opinions, and the opinions received had been dealt with. However, a new date for public discussion was not set according to the development consent. The court ruled that the participatory rights of BUND were violated by the Federal Railways Authority.

Public participation should not be a mere formality, checking off a list to ensure that some sort of comment is allowed. Rather, it is supposed to achieve two goals: improved decision-making by the authorities, and the implementation of the rights of the public to influence

decision-making through the expression of its demands. To allow comments on one version of a proposal but to deny the chance for comments or a hearing when the proposal is changed in an important way does not achieve either goal. The German court recognised this and provided for the enforcement of the rights to *proper* participation.

Germany Case 6 (the Elbe Case) involved the question whether the issuing of a permit should be dealt with under one procedure (which required public participation) or another (which did not require it). The government, according to the law, chose the second procedure and NGOs appealed to the court. The court ruled that the use of the second procedure was lawful. It made a distinction between a development project involving a waterway, which had to be executed with public participation, and the maintenance of a waterway, which did not. This illustrates that, even when procedures for participation are available, they may contain exceptions that may lead to the overriding of the general obligation to allow public participation.

One of the necessary requirements for a proper public participation procedure is that the public must be able to understand the relevant environmental documents, as illustrated in United States Case 1 (the Telephone Case). Without comprehensible documentation, public participation will be merely a formality, without any chance of benefiting either the public or public authorities. This case illustrates how such an improper procedure can be challenged. The highly technical language of the EIA in this case was difficult to understand by a layperson. Even a Harvard University professor, who helped to prepare the EIA, had difficulty explaining it. As a result, the court issued a nationwide injunction against a pesticide spraying programme, until proper procedures could be followed. This case upheld the right of the public to demand clear documents as part of their participation and commenting in an EIA process, and showed that the court can be a bulwark in support of those rights.

### Justice in events of an inadequate response to comments received (failure to take due account)

Aarhus Convention parties must ensure that a decision takes account of the outcome of the public participation process. This means that a public authority has to listen to public opinion and take it into consideration during decision-making. It also means that, if a reasonable public suggestion is rejected, there should be an explanation of the reasons for such a rejection.

In Poland Case 1 (the Highway and Housing Case), residents of the Muchobor Maly housing estate in Wroclaw

claimed that a proposal to build a district highway near their housing estate would be illegal. They separately appealed the development consent and the building permit. Comments on the inadequacy of the EIA by residents living close to the new highway construction were rejected administratively. On appeal, the Supreme Administrative Court agreed with some of the residents' comments, however, apparently requiring new conditions for building the highway. This case illustrates the potential for judicial correction of a failure to take comments into account. In addition, there was an appeal to another independent body, the EIA Commission of the Ministry of Environment, which agreed that the EIA was not in compliance with the law, but the lack of citizen appeals at an earlier time resulted in allowing the EIA to stand.

These cases suggest that citizens can challenge inadequate compliance with participation procedures in some countries, under certain circumstances. The fact that such cases are brought before the courts shows how important access to justice is to environmental law.

## Judicial challenges to substantive illegality

Arguments on procedural violations will sometimes not be taken into account by a court. They may not be sufficient, or the substance of a decision will be inadequate where there are no procedural violations. For example, in Serbia and Montenegro Case 3 (the Cacak Case) the procedure was formally upheld, but the public was not satisfied with the decision.

In some countries in the UNECE region, EIA legislation allows for the review *both* of compliance with EIA procedures *and* of the substantive merits of the decision through the administrative review process. For instance, in Bulgaria Case 1 (the Pirin Mountain Case), six environmental NGOs appealed the substantive legality as well as the procedural legality of an EIA decision. In EECCA countries, the environmental expertise process brings substantive legality even more to the forefront in judicial challenges.

In many cases, challenging the substantive legality of a decision is not easy. It usually requires the involvement of experts, which may lead to financial barriers (see Part I, chapter 7, Costs of experts). In addition, there may be a general lack of real independent experts. Such a problem is illustrated by Kazakhstan Case 1 (the Petrol Plant Case). In this case, state expertise was inadequate. The main obstacle in the case was a lack of independent environmental expertise.



# Chapter 3

## The public's right to enforce environmental law

John E. Bonine

Article 9(3) of the Aarhus Convention states that:

“In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.”

The right to enforce environmental law under article 9(3) of the Aarhus Convention can include two concepts:

- the right of government institutions, NGOs or people to enforce the law against private persons outside the government (for example, enterprises and others who are subject to it); and
- the right of the public (or perhaps an ombudsman) to complain in court about a government act or omission.

Article 9(3) provokes many questions, including the following:

- What can be reviewed?
- What can trigger the review procedure?
- Who can ask for review (standing)?

In this chapter, the focus is primarily on the last question: *who* can ask for review? It is this question (often asking whether a party has a “sufficient interest”) that appears most often in cases considered in this handbook.

### What can be reviewed? Contraventions of national law relating to the environment

Article 9(3) of the Aarhus Convention allows a person to challenge acts and omissions by private persons and

public authorities “which contravene provisions of its national law relating to the environment”. A wide number of laws are likely to be considered in the category that “relate” to the environment in some way. One scholarly analysis concluded: “This provision allows the public to enforce a broad range of environmental laws.”<sup>21</sup>

### What can trigger the review procedure? Acts and omissions, private and public

Article 9(3) of the Aarhus Convention allows a person to challenge “acts and omissions” by “private persons and public authorities” that contravene provisions of its national law relating to the environment. Obviously this covers failures to take action required by law, as well as actions that themselves violate the law. In addition, according to the *Implementation Guide to the Aarhus Convention*: “Omissions’ ... includes the failure to implement or enforce environmental law with respect to other public authorities or private entities.”<sup>22</sup> Another aspect is whether members of the public could indirectly initiate criminal actions, a matter which was discussed at the Workshop on Access to Justice in Environmental Matters under the Aarhus Convention, held in September 2001.<sup>23</sup> The UK is an example where this is possible.

### Who can ask for the review? Standing

The question of who has the right to enforce a statutory (or constitutional) obligation when a fellow citizen or government official is disregarding that obligation is labelled in many countries as “standing to sue” or *locus standi*. The traditional law of standing in many countries prohibited corporations, as well as citizens, from suing the government unless they were “aggrieved” or a “legal right” was violated. Corporations usually had no problem satisfy-

ing such standards. This purportedly neutral rule, therefore, had the effect of allowing business interests into the court to complain about violations of the law more readily than members of civil society.

Article 9 of the Aarhus Convention was designed to liberalise the classes and categories of persons (natural or legal) who can file lawsuits against public authorities and others when they perceive there to be a violation of law.<sup>24</sup> The liberalisations that have occurred mostly appear to have been already in place before ratification of the Convention and are discussed below.

A party must ensure that members of the public can file challenges to actions of private persons as well as public authorities that are alleged to contravene national environmental law, or have official status in administrative procedures leading to enforcement “where they meet the criteria, if any, laid down in its national law.” The provision does not state that members of the public can file lawsuits if *permitted* by national law. Instead, it grants the right to sue or complain and then permits parties to lay down “criteria” if they wish to do so. If specific criteria are not laid down in national law, the logical interpretation would be that members of the public should be deemed to have the right to go to court or to an administrative body. This obviously raises questions of determining whether any criteria *are* laid down, whether they are laid down in “law,” and what they determine.

Judicial interpretation can play a significant role in implementing the Aarhus Convention (see section on constitutional interpretations expanding standing below). Although article 9 of the Convention can be read as being of little *direct* help to a prospective litigant, it can also be read as modifying or overriding pre-existing national law and thereby having direct effect.<sup>25</sup>

## National legislation for expanded enforcement/standing

Several broad legislative models are used with respect to standing in the UNECE area: *actio popularis*; NGO standing; sufficient interest standing; and legal rights standing.

### Actio popularis

Some countries use a model in which legislation declares that “any person” can sue the government when it breaks the law — an *actio popularis*. This is fully consistent with article 9 of the Aarhus Convention, even though it is not required by the Convention.

The Netherlands may well have the least restrictive legislative criteria in Europe for accessing the courts.<sup>26</sup> Furthermore, the Netherlands links administrative standing and judicial standing by allowing “anyone” to participate in the consultation process with a public authority and then granting anyone who has lodged objections at the consultation stage the right to ask a court for judicial review of the

decision.<sup>27</sup> Additionally, the Netherlands also extends standing to NGOs in civil lawsuits much like Italy, Switzerland, or many German *Länder*.<sup>28</sup> As explained in Netherlands Case 2 (the “Indispensable” Pesticides Case):

“Since 1987 environmental NGOs in the Netherlands are ... recognised in every court to have an interest in protecting the environment. This is a general interest and there is no need for ownership or other more specific interests.”

These developments were largely the result of the jurisprudence of court decisions and were codified in section 3.305a of the Civil Code, which has been treated by the courts as making no restrictive changes to the broad Dutch jurisprudential rule of NGO standing.

Further provisions are found in the Dutch Environmental Protection Act, adopted in 1993. This law, which consolidates a number of previous statutes into a comprehensive statute, controls licensing and other matters, sets out provisions for public participation, and provides for judicial review of such matters. The question of standing for judicial review requires consultation of both the General Administrative Law Act and the Environmental Protection Act. Betlem explained this as follows:

“The combined effect of these two Acts entitles those who have lodged objections in the consultation stage of the decision making process to apply for judicial review of the decision. Because ‘anyone’ has the right to make reservations in the preparatory phase of the licensing process, a two stage *actio popularis* accordingly applies. In technical legal terms, in the main it [is] so-called ‘interested persons’ who have *locus standi*, including public authorities and non-governmental organisations.”<sup>29</sup>

A well-known court case in the Netherlands also recognised NGO standing. In the Reinwater case, the highest Dutch court gave environmental organisations standing to sue where (1) the stated purpose of an organisation has been affected, (2) the interests in the lawsuit lend themselves to grouping, and (3) the interests served by the litigation are protected by civil law.<sup>30</sup>

As a final note, environmental NGOs in the Netherlands are allowed to appear in the administrative court (but not the civil court) without being represented by a lawyer. Thus, in practice, many cases in the administrative courts are argued by economists, scientists and engineers.

### Legislated NGO standing for recognised NGOs

The second model can be loosely termed *NGO standing*. Under this model, several countries grant a special right to NGOs to file lawsuits without showing that they are personally interested or in some way affected by a decision. Legislation either specifies the characteristics of NGOs that are given standing, or it provides that a state

authority will create and maintain a list of NGOs that are automatically granted standing and permitted to take claims of illegal acts by government to the courts.

According to a 1992 study, Switzerland was the first European country to legislate a right of action (or standing to sue) for environmental NGOs.<sup>31</sup> In Switzerland, article 12 of the Federal Nature and Heritage Conservation Act of 1966 allows appeals against administrative decisions to the Supreme Court, for nationwide nature associations. The same can be found in article 55 of the Environmental Protection Act of 1983 for nationwide nature NGOs, provided they were founded at least ten years before the lawsuit and are officially recognised by the federal government.<sup>32</sup> A third law, the Trails and Footpaths Act of 1987, also uses this accreditation procedure.<sup>33</sup>

In Italy, articles 13(1) and 18(5) of Law no. 349 of 1986 grant environmental associations the right to sue in administrative courts if they have been recognised for this purpose in a ministerial decree.<sup>34</sup>

### **Sufficient interest: Flexible subjective requirements for standing**

A third model, *sufficient interest standing*, grants legal standing to those who are “affected” (sometimes “interests” have to be affected). This may be granted either in general terms for all persons, or as a part of granting legislated NGO standing.

The case studies included in this handbook often mention standing as an issue. Standing is often governed by legislation that requires the litigant to have an “interest” of some kind, in order to be among those who are allowed to bring a court case.

What exactly is the “interest” of an NGO organised to serve a broader public interest, and not the narrow interest of its “owners?” Article 3.4 of the Aarhus Convention answers that, unless there is national legislation imposing special requirements, interest is simply the fact that an NGO is devoted to environmental protection.

In Belgium, legislation requires that a person have an “interest.” The courts have generally interpreted the legislation to require that a natural or legal person must show a personal and direct interest in order to have access to any courts.<sup>35</sup> Belgium Case 1 confronted the question in 1981 of determining whether an NGO’s definition of its “interest” in its own statute (charter, or legal registration) could be used in deciding whether it can sue to enforce environmental laws. The Council of State (which hears administrative cases) decided that protection of the environment was a public interest and that an environmental group only needs to represent a point of view that concurs with that of a group interested in the environment.

The Council of State’s broadened approach to standing was not followed in the civil courts. In the same year as Belgium Case 1, the Supreme Court ruled (and has since reaffirmed on numerous occasions) in a civil case involving the same issue and plaintiff that a purpose in an NGO’s

“statute” *cannot* be considered a personal and direct interest for the purposes of the *civil* courts.

A second method of gaining access to the Council of State to challenge administrative acts is for an NGO to show that its “statutory purpose” is affected by the decision that it is challenging. The question of NGOs satisfying the “personal and direct interest” requirement before the Council of State has continuously arisen in several cases. In Belgium Case 3, the Council of State ruled that NGO purposes such as promoting nature conservation and protecting wildlife are only “general” interests and not “personal” ones for the purposes of gaining access to justice; that an interest in nature reserves is not a personal interest if the act being challenged does not directly impact on one of the reserves being operated by the NGO; and that an interest in protecting birds is not sufficient to challenge a decision that will harm frogs.<sup>36</sup>

This question was also fermenting in the Belgian legal system because of legislation adopted in 1993 that sought to broaden access to the courts by NGOs, using a “special procedure.” One commentator notes that Belgium’s Right of Action Relating to the Protection of the Environment Act of 1993 “recognizes a restricted right in associations: they must be registered as environmental protection associations for at least three years, can challenge specific elements in environmental statutes, and may request either injunctive relief or imposition of preventive measures.”<sup>37</sup>

One judge in the civil courts has been willing to treat the broadened standing approach of the 1993 legislation as relevant even in cases not covered by it. Belgium Case 2 involved a challenge to night-time flights disturbing the sleep of residents near an airport. The airport asserted that the NGO had no standing to sue in the “normal” procedure, because it lacked a “personal” interest. The court of first instance decided, however, that the meaning of interests had, in effect, been broadened by the legislature to include collective interests in the 1993 legislation (even though the plaintiffs were not using the procedures in this legislation). He stated that the legislation added some meaning to the right to a healthy environment enshrined in article 23 of the Belgian Constitution. Since the judge did not suspend the flights, the interpretation is not likely to be reviewed any time soon by the Supreme Court.

In Georgia, according to chapter XLIV of the Code of Civil Procedure (1999), citizens are entitled to sue against an administrative act only in cases where it directly affects their legal rights. Georgia Case 2 (Vake Park Case) involved NGOs proving that they had a “sufficient interest” to meet this test. They were successful, showing that the “plaintiff had no information about issuance of the administrative acts [the permits were never published] — he even had no chance to be involved in the decision making process.” In Georgia Case 1 (Defence of National Park) NGOs found themselves in the unusual position of arguing that the plaintiff (a group of farmers) in the case had *no* legal standing.

In some instances, where legislation recognises broadened standing in environmental cases, the public authority claims that the matter is not environmental, and the broadened standing test therefore does not apply. This was the situation in Hungary Case 1 (the Balaton Highway Case). The Somogy Nature Conservation Organisation was denied standing in cases opposing permits for a new road that would cut through a forest. The courts, including ultimately the Supreme Court, ruled that, even though environmental NGOs have standing without doubt in “environmental” cases, a case related to the construction of a highway is not an “environmental” case. The court apparently ruled that a matter has to be explicitly classified as “environmental” by the Act on Environmental Protection, such as EIA and environmental audit cases.

### Legal rights or individual interests: restrictive subjective requirements for standing

Countries using the fourth and oldest model, *legal rights or legal interests standing*, grant legal standing only to those with economic interests, or similar very specific interests, to protect. A variety of terms is used, such as a requirement for a “direct and personal” interest, the “violation of a right,” or a “legal interest.” It is important to note that a person with an economic interest will usually be admitted into the court under the fourth model, while those with an interest in *non-economic* values or enforcement of the rule of law will often not be able to sue.

The legislation in some jurisdictions appears to restrict standing more explicitly on its face, granting standing only for those with a “direct and individual” or “direct and personal” interest. Interpretations of these terms can vary dramatically, however, as can be seen when comparing decisions of the European Court of Justice and the Council of State of Greece. For those jurisdictions where courts have issued restrictive interpretations that appear to deny rights granted by article 9 of the Aarhus Convention, a significant question arises: must the legislation be amended in the light of the Aarhus Convention, or will it be interpreted differently by the courts, in order to give effect to the commitments expressed by parties in ratifying the Convention? It could be argued that both branches of government have an equal obligation to take account of the rights in article 9.

The European Court of Justice refused to take a broad view of standing in environmental matters in the 1998 case *Stichting Greenpeace Council et al. v. European Commission* (see appendix B).<sup>38</sup> Several individuals and NGOs brought suit in the European court of first instance, contesting the legality of EC funding for two fossil fuel-fired power plants being built by Spain in the Canary Islands. The court denied standing. On appeal, the European Court of Justice also denied standing. The relevant provision of the Treaty Establishing the European Community<sup>39</sup> is article 230(4):

“Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”

The court of first instance said that the individual plaintiffs (including local residents, farmers and fishermen) would not suffer from the decision in any way other than that of other residents of the Canary Islands, and therefore the matter could not be of “direct and individual concern.” Furthermore, Greenpeace, as an NGO, could not have standing since it did not simply represent individuals who would have standing, nor did it have some special, individualised interest of its own. Furthermore, participating in prior proceedings was not enough to give Greenpeace a special, individualised interest. The European Court of Justice upheld the lower court. For individuals, it said:

“[T]he specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and in fact, like any other person in the same situation, the applicant is not individually concerned by the act.”<sup>40</sup>

As for Greenpeace, its arguments for general public interest standing and about the vacuum in enforcement of EU laws created by restrictive interpretations of article 230 fell on deaf ears. So did its argument that the right to be informed and consulted in an EIA procedure gives it a right to go to court.<sup>41</sup>

In Greece administrative acts can be challenged in front of the Council of State, which is the supreme administrative court in the country. The situation can be compared to that in Belgium, as discussed above. According to a professor of public law and environmental law at the University of Athens, “[t]he jurisprudence of this court, on environmental matters, has been very rich and very innovative, since 1977.”<sup>42</sup> The Council of State’s jurisdiction over environmental law is based on the fact that article 24 of the Constitution of 1975 makes the protection of the environment an obligation of the state. At the beginning of the 1990s, the Fifth Section, a separate section of the Council of State was created for environmental disputes. The court has annulled illegal administrative acts, suspended the execution of harmful administrative acts, and formulated fundamental environmental principles that have strongly influenced environmental legislation.<sup>43</sup>

*Locus standi* in front of the Council of State to annul an administrative act is available to both natural and legal persons (organisations and businesses), but only if they prove “a personal, direct and present legal interest.”<sup>44</sup> But this “legal interest” has been interpreted by the Council of State to be broader in environmental disputes than in other matters. If a natural person has “any kind of a territorial rela-



tion with the area” of environmental damage, the person can have standing. This allows an interest that need not be strictly personal, may be only indirect, and can even be merely potential rather than already in existence.<sup>45</sup> This is based on article 24 of the Constitution which, by creating a *duty* on the state is considered to create a collective and “supra-individual” right.

Traditional legal doctrine in Germany has disfavoured allowing the public to go to court to require the state to abide by the law. As one writer has put it, “German standing doctrine is built on deeply-engrained principles against the general legality view of access to court and the right of citizen groups to challenge administrative action.”<sup>46</sup> On the other hand, many of the *Länder*, or states, have been notably more progressive and open toward granting standing to sue, particularly for established environmental NGOs. This openness at the legislative level has not necessarily led to expansive court decisions, however. For example, in a case in the 1980s, a public authority used an informal procedure with no public participation, in order to avoid the formal planning procedure that would have clearly allowed public participation (with regard to certain issues on a controversial extension of a runway at Frankfurt Airport). An NGO sued and won in the trial court, but the Court of Appeals ruled that the NGO could not challenge the failure to use the formal procedures that guaranteed participation, because its lack of participation itself precluded court litigation concerning whether it should have been allowed to do so.<sup>47</sup> But as Germany Case 3 (the Windmill Case) shows, other German courts have been receptive to NGO lawsuits under *Länder* legislation. In this case, involving a nature conservation association recognised in accordance with §29 of the Federal Nature Conservation Act, the court ruled that an NGO could take legal action in accordance with §42, paragraph 2, of the Code of Administrative Procedure, without being required to prove that its own rights had been infringed.

Some countries with seemingly restrictive “legal interest” tests have found a way to liberalise standing through interpretation. For example, environmental protection associations have had some success in gaining standing in Norway even though it uses a “legal interest” test.<sup>48</sup> As long ago as the *Alta* case in Norway in 1979, Norges Naturvernforbundet (Norwegian Society for the Preservation of Nature) successfully achieved legal standing. The Norwegian Supreme Court stated:

“It has been accepted under the circumstances that a plaintiff may have a legal interest in bringing an action even though the decision has no direct influence on his own legal position. Depending on the circumstances, also an interest organization may have the required legal interest even though the decision in the matter is of no direct consequences to the organization’s or the members’ rights. The need for judicial control of the public administration may be the decisive factor here.”<sup>49</sup>

According to one scholar, “[t]he grounds in the *Alta* case for accepting the organization’s legal interest were the allegations concerning nature conservation interests.”<sup>50</sup>

## Judicial interpretations and expanded standing

Legislative changes are not the only means for broadening or narrowing categories of those who can enforce environmental or other laws. The judicial system in many countries has something important to say about standing — whether it is the interpretation of statutes (discussed above), the explicit common law reasoning of England, Wales and Northern Ireland, or the use of constitutional interpretation as a tool.

### Common law expansion of standing

A series of decisions made it clear how broad the right of legal standing is in England, at least in environmental cases. The environmental group Greenpeace was granted standing in the Thorp Nuclear Case to challenge a proposed licence for a nuclear power plant. The High Court said that Greenpeace was a “responsible and respected body with a genuine concern for the environment” and that the granting of standing to pursue the litigation would save the court’s time. Greenpeace would efficiently and effectively represent the interests of 2,500 of its supporters living in the area of the proposed nuclear plant. This may be seen as a kind of “representational standing,” or perhaps “third-party standing,” in lieu of others who would have had ordinary standing.<sup>51</sup> Judge Otton said:

“I reject the argument that Greenpeace is a ‘mere’ or ‘meddlesome busybody’ ... I regard the applicants as eminently respectable and responsible and their genuine interest in the issues raised is sufficient for them to be granted *locus standi*.”<sup>52</sup>

Ex parte Richard Dixon<sup>53</sup> continued the liberalisation and the exposition of the viewpoints that public law is about duties, not rights. Justice Sedley wrote:

“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs — that is to say, misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well-placed to call the attention of the court to an apparent misuse of public power.”<sup>54</sup>

### Constitutional interpretations expanding standing

The constitutions of a growing number of countries form the basis for increased access to justice through judi-

cial interpretation. Sometimes constitutions are explicit in their *locus standi* provisions, while others have been used by judges to broaden standing.

In Europe, some courts have found that the constitutional rights to a safe environment embody implied rights of access to justice. As the emerging democracies of the CEE region rewrote their constitutions in the early 1990s in the wake of the fall of Communism, they included two significant types of provisions that are not to be found in the older constitutions of the US or Western European countries. The first was the right to a safe or healthy environment, while the second proclaimed rights of access to information, public participation and access to the courts.

The development of the right to a healthy environment in the UNECE region is discussed in Part II (chapter 1). It is mentioned here in connection with opportunities for members of the public to challenge acts or omissions in violation of environmental law. At least two constitutional courts in the CEE region have interpreted the right to a safe environment thus far. The Constitutional Court of Slovenia has stated that the right to a healthy environment guarantees at least the right of access to the courts — an abolition of restrictions on standing to sue in environmental matters. The Constitutional Court of Hungary has gone even further.

Section 162 of the Constitution of Slovenia provides that “[a]ny person who can show a proper legal interest, as determined by statute” may bring a case before the Constitutional Court.<sup>55</sup> As recently as 1993, the Constitutional Court explicitly rejected the idea of an *actio popularis* that could allow any person to bring a case based upon an interest in upholding the rule of law. In a typical case the Court said:

“A general interest in ensuring constitutionality and legality and implementing the principles of the Rule of Law is insufficient to fulfil the constitutionally defined condition for lodging an initiative, since such a wide interpretation of legal interest could be invoked by anyone in any case, whereby the limiting meaning of the second paragraph of Article 162 of the Constitution would be lost. The legal interest of the initiator himself must thus be demonstrated, not just a general social interest in ensuring constitutionality and legality.”<sup>56</sup>

Without *actio popularis*, however, another legal basis had to be found for environmental matters to come to the Constitutional Court. The question became, then, whether a statute, explicitly or implicitly, has provided a person with a “legal interest.”

The Constitutional Court of Slovenia granted standing in a case brought by the Association of Ecologists of Slovenia (see appendix B),<sup>57</sup> a national NGO and 25 individuals.<sup>58</sup> The NGO achieved standing in large part because the Environmental Protection Act, which came into effect in 1993, provided that the protection of the environment is the responsibility of, inter alia, professional and

other NGOs committed to environmental protection.<sup>59</sup> The court therefore concluded that the NGO could bring lawsuits based on its stated purposes. Individuals were also granted standing to sue. The Constitutional Court recognised the legal interest of an individual in such a matter for the first time, on the basis that article 72 of the Constitution contains the right to a healthy environment in which to live. The Court ruled that a person’s interest is not limited only to the environment close to the place where he or she lives. Essentially, a right that on its face is substantive was converted by the Court into a procedural right giving access to the judicial process.

It is now increasingly apparent that NGOs devoted to environmental protection can have the right to bring matters before the Constitutional Court. Legislation recognising the special responsibilities of NGOs to protect the environment, and the existence of a constitutional right to a healthy environment provide the basis on which the court has been able to find a “proper legal interest.”

The Hungarian Constitution contains a “right to a safe environment” that is similar to that of Slovenia. It is asserted that this right can be used to obtain access to the courts in Hungary.<sup>60</sup> Article 18 of the Hungarian Constitution confers the right to a healthy environment to all persons, “without discrimination among nationalities.” Thus this right may also be claimed by citizens of other countries.<sup>61</sup> This is obviously of some interest in the light of article 3(9) of the Aarhus Convention, which states that persons shall “have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile.”

Other experts have subsequently commented that the Hungarian Constitutional Court has indeed provided “open access to citizen petitions.” It was contended earlier by Bandi that this would give the Constitutional Court a greater sense of legitimacy among citizens.<sup>62</sup>

In fact, in the Protected Forest Case (see appendix B), the Constitutional Court of Hungary held that articles 18 and 70/D of the Constitution demand a high level of environmental protection, that citizens can enforce this right, and that the court can overturn a law as unconstitutional if it concludes that it has contravened this right (see Part II, chapter 1). In a case involving a challenge to legislation allowing the privatisation of cultivated forest land, the court ruled that the legislation, which contained no special duties to protect the forests and thus weakened protection in comparison to the status quo, was unconstitutional under the environmental rights provisions of the Hungarian Constitution.<sup>63</sup> The court classified the environmental right as a third-generation constitutional right, deserving of no less protection than traditional rights. This remarkable ruling raises the possibility of other court rulings against legislation seen as environmentally inadequate.

It is undoubtedly too early to predict where constitutional litigation will go in the coming years under the envi-

ronmental rights provisions of various European constitutions. It is self-evident, however, that these provisions cannot be dismissed as mere window-dressing.

### The rule of law

The website of the European Court of Justice proclaims: "The great innovation of the European Communities in comparison with previous attempts at European unification lies in the fact that the Community

uses only the rule of law to achieve that end."<sup>64</sup> As the Court of Justice says further, "any true legal system ... needs an effective system of *judicial safeguards* when ... law is challenged or must be applied."<sup>65</sup>

Focus on the rule of law is, indeed, also the primary message of article 9 of the Aarhus Convention. Parties to the Aarhus Convention have a great deal of work to do if the promise of article 9(3) to ensure access to justice is to be fulfilled, so that the law derived from the Convention's obligations can be truly applied in the spirit of the rule of law.





# Chapter 4

## Administrative, judicial and other means of access to justice

Remo Savoia

A complainant must resort to certain mechanisms, procedures and bodies for access to justice. Most legal systems provide various means of access to justice, including administrative review, judicial review of administrative decisions, an ombudsman, arbitration and mediation. Article 9 of the Aarhus Convention takes into account the availability of such means of access to justice by providing opportunities for both administrative and judicial review to be made available to challenge actions of public authorities with respect to matters under the Convention.

### Administrative versus judicial appeal

Most UNECE countries have a general kind of administrative review process for decisions by public authorities. This administrative process mostly functions more rapidly than an appeal to a court and is often free of charge. The administrative appeal system is not intended to replace the opportunity to appeal to a court, where such an opportunity exists, but in many cases may resolve the matter expeditiously and avoid the need to go to court. In the case of challenges to decisions on access to information, according to the Aarhus Convention,<sup>66</sup> the administrative appeal procedure may take two forms — either a “typical” appeal to a higher administrative authority, or a request for the same authority to reconsider its decision, before going to court.

The right to use the administrative system to appeal against decisions resulting from an administrative procedure is recognised for affected persons in all Western European countries. In the majority of the countries in Central Europe and the EECCA region, the right of administrative standing in the case of infringement of access to information, as well as public participation rights are also guaranteed constitutionally, and in administrative and environmental legislation. Certain countries have administrative courts (e.g. Estonia, Slovakia and Slovenia) or specific administrative institutions for this purpose (e.g. the Czech Republic and Latvia). Only in Bosnia and Herzegovina are there no administrative appeal provisions. In all countries, standing in administrative appeal proceed-

ings is limited to interested and/or affected individuals and, with the exception of Hungary, Poland, Moldova, Russia and Ukraine, to interested and/or affected NGOs.<sup>67</sup>

In many countries it is necessary to exhaust all available administrative review procedures before going to court.<sup>68</sup> As demonstrated by the three Spanish case studies, an administrative appeal can be reversed by the Supreme Court.<sup>69</sup>

In Germany Case 3 (the Windmill Case), for instance, lodging an appeal for administrative review before bringing a legal action for annulment is, in general, necessary, according to the Code of Administrative Procedure.

In Denmark, on the contrary, ordinary courts deal with administrative law cases, not necessarily only after the administrative appeal possibilities have been exhausted. However, ordinary courts show respect for the control methods of the administration. It is considered desirable to make use of the administrative appeal system before going to the courts of law. The Danish courts generally respect the administrative appeal system, though the administrative appeal procedure is rather informal.<sup>70</sup>

In Spain, the possibility of an administrative appeal depends on who issued the decision. If the issuing authority hierarchically depends on another authority, it is the latter that will decide on the administrative appeal. After an unsatisfactory decision of the higher authority, a complainant may file a reconsideration appeal before this authority prior to appealing before the courts, or may go directly to the administrative court.<sup>71</sup>

In Georgia, according to the new Code of Administrative Procedure, an administrative act can be appealed in court only when this act has an impact on the personal legal rights of the plaintiff. This means that the plaintiff has to prove his or her sufficient interest in the case.

In order to overcome the complications and length of judicial procedures, the complainant in Russia Case 3 (the Shrinking Park Case), for instance, chose the procedural form of complaint under chapter 24-1 of the Russian Federation Code of Civil Procedure, which appeared to be a faster solution than a lawsuit.

In Western European countries, the relative efficiency

offered in practice by administrative review is well developed. In Denmark, for instance, there is an obligation on each public authority that makes a legally binding decision (whether concerning the environment or any other topic) against a complainant to explain to the complainant how he or she can appeal against such a decision. This is consistent with article 9 of the Aarhus Convention.

## Special environmental tribunals

One solution to the general difficulty experienced by judges and other legal professionals in dealing with the complexity and peculiarities of environmental cases is to establish specialised tribunals with jurisdiction and expertise over environmental matters. On the national level, such tribunals have been established in Australia, New Zealand and, in the UNECE region, most recently in Sweden. On the international level, several initiatives are under way to establish an international environmental tribunal.

## The ombudsman

The institution of an ombudsman<sup>72</sup> as an independent and impartial review body for violations of administrative law against citizens was developed in the Scandinavian countries.<sup>73</sup> Currently,<sup>74</sup> this institution, or a similar one, functions in many Western European<sup>75</sup> and EECCA countries,<sup>76</sup> as well as on the supranational level (see examples of Denmark and Hungary, and the Friends of the Earth case in appendix B). In Croatia, Hungary, Poland and Slovenia, as well as many Western European countries, it is specified that citizens have the possibility to appeal to the ombudsman on environmental issues.

The ombudsman deals with complaints from the public regarding decisions, actions or omissions by the public administration. The ombudsman is elected by parliament or appointed by the head of state or government after consultation with parliament. The role of the ombudsman is to protect the people against violations of rights, abuse of powers, error, negligence, unfair decisions and maladministration, in order to improve the public administration and make the government's actions more open, and the government and its officials more accountable to the public. The office of the ombudsman may be enshrined in a country's constitution and supported by legislation, or created by a separate act of the legislature.

The ombudsman usually has the power to undertake an objective investigation into complaints from the public about the administration of government. The ombudsman may also have powers to initiate an investigation even if a complaint has not been received. To protect people's rights, the ombudsman has various tools:

- investigate whether the administration of government is being performed contrary to law or unfairly;

- if an objective investigation uncovers improper administration, make recommendations to eliminate the improper administrative conduct; and
- report on his activities in specific cases to the government and the complainant, and, if the recommendations made in a specific case have not been accepted by the government, to the legislature.

In most countries, the ombudsman also submits an annual report on his or her work to the legislature and to the general public.

The ombudsman usually does not have the power to make decisions that are legally binding for the government, in contrast with judicial decisions. According to most national legislation, approaching the ombudsman with a complaint does not exclude a later judicial procedure. The ombudsman has moral power and makes recommendations for measures to be taken, as supported by a thorough investigation of the complaint. A vital characteristic of the ombudsman's office is its independence from the executive/administrative branch of government. Another advantage is that the ombudsman can usually take rather quick or even immediate action, and examinations initiated by this office are free of charge. For the ombudsman's investigations and recommendations to be credible to both the public and the government, the ombudsman maintains and protects the impartiality and integrity of his office.

The Aarhus Convention does not explicitly mention the institution of ombudsman. The phrase, "another independent and impartial body established by law," used in article 9(1) may possibly imply such an institution. Strictly speaking, this would depend on its characteristics, but the ombudsman typically does not grant a legal right to a review procedure, supply binding decisions, or provide injunctive relief.<sup>77</sup> The four Scandinavian countries presented a common interpretative statement during the negotiations relating to article 9 of the Aarhus Convention. According to the statement, the institution of the ombudsman may correspond with the requirements of the Convention in practical, but not in legal terms. Thus, it may provide a *practical* means for access to justice in specific cases that is often cheaper, quicker and just as effective as proper judicial proceedings.

An example of how the institution of ombudsman can work is provided in the case of Friends of the Earth (see appendix B). In the first instance, the NGO appealed to the Secretary-General of the Commission about the refusal to disclose information, as required by the Code of Conduct concerning public access to Commission and Council documents attached to Commission Decision 94/90/EC. The Secretary-General upheld the Commission's refusal. Friends of the Earth then appealed to the European Ombudsman,<sup>78</sup> who ruled that the Commission wrongfully refused to provide the requested information. It also argued that the Commission was acting inconsistently with

the Aarhus Convention. This case is a good example of how a decision resulting from an administrative appeal can be reversed in a fast and effective manner using instruments other than a “traditional” judicial procedure.

### Arbitration and mediation

“Alternative dispute resolution”<sup>79</sup> is an activity that covers a variety of out-of-court bodies, which provide alternatives to litigation through the courts. While this is not appropriate for many matters under the Aarhus Convention, it may be relevant especially where environmental organisations involved in public participation proceedings have grounds for complaint and seek to negotiate a settlement. In most cases, it is necessary to turn to such alternatives because the traditional judiciary is often too expensive and time consuming. In addition, by accepting a decision through arbitration or mediation, public authorities do not have to face the stigma of an adverse ruling.

Alternative dispute resolution procedures may include, but are not confined to arbitration, early neutral evaluation, expert determination, mediation and conciliation. Accordingly, the mechanisms for resolving disputes may vary from binding decisions to recommendations or agreements between the parties. The organisation and management of these procedures may also vary: they may be publicly or privately organised and take the form of an ombudsman scheme, consumer complaint board, private mediator, trade association or others. Which of the above procedures is the most appropriate will depend on the nature of the dispute to be resolved.

Procedures can be distinguished on the basis of whether a neutral third party proposes or makes a decision

(arbitration) or whether the third party seeks to bring the parties together and assist them in finding an agreement by common consent (mediation). Arbitration may be binding or non-binding (advisory), court-ordered or voluntary. Binding arbitration involves having a neutral person (or a panel of neutral persons) decide a dispute, after hearing each party’s presentation of evidence and argument. The parties agree in advance that the decision (*award*) of the third party is to be final. Generally, there are no appeals from an arbitrator’s award, though parties may seek judicial relief from binding arbitration under certain circumstances. These include if the arbitrator exceeds the authority conferred under the parties’ agreement to arbitrate, denies a party a fair hearing, or demonstrates bias or prejudice. Parties may also sometimes seek judicial relief if there is an obvious mistake, such as a calculation error, that appears on the face of an award.

The Permanent Court of Arbitration has adopted optional rules for arbitrating disputes relating to the environment and/or natural resources,<sup>80</sup> supplemented by environmental conciliation rules adopted in 2002. These rules are potentially available for application in a wide range of disputes, including those among private parties or between private and public parties.

Mediation is another process for resolving disputes with the aid of a neutral entity. The third party’s role involves assisting parties, privately and collectively, to identify the issues in dispute and to develop proposals to resolve the disputes. Unlike arbitration, the mediator is not empowered to make decisions. Accordingly, the mediator may meet privately and hold confidential and separate discussions with the parties to a dispute.



# Chapter 5

## Administration of justice and due process

Marianna Bolshakova

Article 9(4) of the Aarhus Convention requires fair procedures for access to justice. Fair procedures, in turn, require impartiality in the access to justice process.<sup>81</sup> The process should also be free from prejudice, favouritism or self-interest.<sup>82</sup> The independence of the judiciary is one of the main preconditions in ensuring fairness in the access to justice process, and its absence precludes the normal exercise of the right of access to justice. A lack of judicial independence has been found, especially in countries where the judiciary has been a voice of government policy and politics.

### Judicial independence

Judicial independence, as defined by the Center for Judicial Independence,<sup>83</sup> is an ideal state of the judicial branch of government that includes two complementary concepts: individual independence and institutional independence. The latter is normally ensured through the constitutional separation of powers. The former is considerably more complicated and is related to the independence of a judge or other person exercising judicial power to decide on each particular case solely on the merits of the law and the facts of the case without undue influence from the government, the parties or the public.

The institutional independence of the judiciary was sometimes the victim of the traditional interdependency between the branches of government that existed in most Central European and EECCA countries until the early 1990s. In some countries, it occasionally still becomes evident. Russia Case 2 (the Nikitin Case) is an example of how the influence and image of the Federal Security Bureau and the Ministry of Defence (formerly major powers within the Soviet system) could make the court return a case repeatedly for further investigation despite the fact that the prosecution lacked incriminating evidence throughout. In Armenia Case 1 (the Victory Park Case) the Armenian court, unable to reject the suit of an NGO against the prime minister, postponed the hearing of the case on a minor procedural point.

The individual independence of judges is closely related to the issue of judicial corruption discussed below. However, while there is evidence that corruption and bribery do indeed take place, especially in countries with weaker economic development, a judge can also be a target of political influence (e.g. through threats of or an actual impeachment process, or elections), or can be dependent on economic benefits.

As Fyodorov, advisor to the Investors' Rights Association, described in his interview on Radio Free Europe, judges in Russia are usually under "administrative pressure."<sup>84</sup> They most often depend on the local government, especially in areas where the local municipality provides the judge with housing or sometimes pays him or her bonuses as a supplement to rather meagre compensation.<sup>85</sup> "It is almost impossible to win a case against the Moscow City Government," according to Fyodorov. Although the phrase refers to the investment-related cases heard by the Court of Arbitration, the same is often true for judges of other courts in the Moscow region.

Some of the cases included in this handbook support these observations. For example, in Russia Case 3 (the Shrinking Park Case) it took three years for the plaintiffs to get their suit accepted by the Moscow City Court. Two rejections were appealed to the Supreme Court on the basis of judicial bias.

Whatever the reason for rejecting a case in a given situation, these precedents might have a certain chilling effect on the use of access to justice mechanisms by the public.

### Corruption

Another factor contributing to the poor functioning of access to justice mechanisms is corruption in the judicial branch. Countries with significant problems in access to justice are often known for a relatively high degree of corrupt practices in all three branches of government: judicial, executive and legislative. While corruption may occur to some degree in all governments, it is likely to blossom more

freely in countries with more serious economic and development problems. Judicial corruption is no exception.

The European Civil Law Convention on Corruption (Strasbourg, 1999)<sup>86</sup> defines corruption as “requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.” As with corruption in other branches of power, judicial corruption is promoted by two factors: the lack of a proper system of monitoring, and poor compensation and other conditions of work.<sup>87</sup>

The first of these is related to the system of government and its ability to ensure proper checks and balances on the judiciary or another branch of government, or to provide for accountability. The latter can be attributed to both the poor legislative regulation of the conduct of the judiciary, as well as to economic problems in society.

Some of the factors contributing to corruption in the judiciary are related to:

- the lack of alternative dispute resolution mechanisms (see chapter 5);
- complicated and non-transparent judicial procedures;
- inconsistent and unclear legislation; and
- in some cases, the presence of organised crime.<sup>88</sup>

Systematic judicial corruption contributes to the growth of public distrust of the justice system and therefore prevents the exercise of rights to access to justice. Where a lack of judicial independence, corruption in other branches of government, and economic difficulties that draw the attention away from environmental issues are also present, access to justice in environmental matters might remain an empty declaration.

There are currently many national and especially international efforts to prevent corruption. The newly developed Council of Europe Criminal Law on Corruption and Civil Law on Corruption<sup>89</sup> — the former already with ten ratifications — the UN Declaration of 1997, and efforts by many international organisations, including the UN and the World Bank, will hopefully lead to a decline in corrupt practices in the region. Long-term measures of institutional reform to ensure greater independence of the judiciary are best supplemented by short-term benefits for public officials (e.g. sufficient salaries, or increased staff and technical capacities).<sup>90</sup>

Countries like Spain and Finland have a “judicial ombudsman” as a mechanism to ensure accountability of the judiciary without influencing the course of justice. The function of control vested in the institution of the ombudsman is considered by some to be fully justified in order to counterbalance rather unlimited powers that might be vested in the judiciary.<sup>91</sup>

Civil society can play a significant role in preventing corruption and supporting judicial independence. NGOs and individuals can act as watchdogs.<sup>92</sup> They can influence the government and the judiciary both in individual cases — Armenia Case 1 (the Victory Park Case), Russia Case 3 (the Shrinking Park Case) and especially Russia Case 2 (the Nikitin Case) — and in general through media attention, cooperation with the government and the negotiating of more efficient monitoring regulations and procedures.

## Knowledge and capacity

Another problem is the lack of judicial capacity and knowledge of environmental law and public participation procedures. The field of environmental law is still rather new, especially in the eastern part of the UNECE region, as are the procedures requiring public participation in decision-making. With an overloaded judiciary giving priority to cases of traditional economic importance, the complexities of environmental legislation are simply not something an average judge or prosecutor pays attention to. In Spain Case 2 (the Aznalcollar Waste Dam Case) not only did the judge lack sufficient knowledge to understand the merits of this complicated case, but the means and resources available to the court (i.e. personnel, equipment and technical support) also proved insufficient for the parties to work with the case records. Some countries, such as Ukraine, have tried to solve this problem by setting up special “environmental” departments in the office of the prosecutor. Some international organisations present specialised training programmes for the judiciary (as well as for the public administration). Sometimes the issue of environmental law is touched upon in regular but infrequent mandatory training sessions organised by the courts themselves. This is clearly not enough, however, considering the complexity of environmental law and public participation procedures. The improved training of judges and prosecutors, as well as reductions in their workload are (arguably) necessary preconditions for efficient access to justice.

## Public support

In countries where corruption and a lack of independence are pervasive, the public tends to give little credence or support to the justice system, even where public authorities and judges perform their duties in a progressive way using contemporary legislation and international norms.

This may be especially true with respect to environmental cases, since the public is still preoccupied with daily economic problems in many countries. It is often true that the better the level of economic development, the stronger the interest of the public and media in issues such as environmental protection and human rights. In some countries the public might even actively reject environ-



mental considerations as an unaffordable luxury when pressed with financial difficulties.<sup>93</sup>

Another reason for the lack of public support is the lack of links between the public and conscientious public officials and judges. One of the practical solutions might be greater media coverage not only of corruption scandals, but also of innovative approaches and progressive judgments by officials and judges.

## Legal certainty

Unclear laws and underdeveloped procedures can contribute to corruption and hinder the whole concept of due process. Unclear, dubious and often conflicting provisions, laws and regulations lead to lengthy court hearings and multiple appeals and revisions. In many cases, rather than go through multiple (sometimes conflicting) provisions and dozens of acts, the judge simply hears both parties and decides to his or her best knowledge. The lack of training and a clear understanding of environmental law and public participation rights and procedures, as discussed above, also contributes to the situation.

The lack of procedural norms regulating public access to information and participation in decision-making complicates the matter significantly. It affects the public itself, as well as government officials responsible for decision-making. When a case is transferred to the court it is the judge who has to clarify the matter, often having to rely on conflicting norms.

Clarification of legal norms and especially the development of detailed procedures are seen as priority tasks by many government officials and judges. This will lead to more efficient decision-making processes, reducing disagreement and therefore the number of cases brought before the courts. Finally, it will make interpretation and adjudication easier for the judges themselves.

## Right to counsel and presumption of innocence

As Russia Case 2 (the Nikitin Case) demonstrated, problems occasionally appear with regard to such basic due process elements as the right to counsel and the presumption of innocence. In this case, the defendant in a criminal proceeding had to turn to the Constitutional Court of the Russian Federation for a ruling that the denial of the right to choose counsel of his own free will was unconstitutional. The defendant had to appeal to the Constitutional Court for a second time three years into the process when the lower court sent his case back to the authorities for further investigation in view of a lack of sufficient evidence. The Constitutional Court ruled that such action was in violation of the constitutional presumption of innocence.

Such approaches appear to violate fundamental concepts of due process and therefore the basic human right to

a fair trial as defined by article 6 of the European Convention on Human Rights and Fundamental Freedoms.<sup>94</sup>

## Judicial consistency and use of precedent

Consistent application of the law is critical to social and economic development. As citizens and legal entities turn to the legal system to resolve disputes, they must perceive that justice is distributed equally and impartially. In order to make informed, law-abiding decisions, they must be able to rely on past applications of the law to be informed about the probable ways in which the law will be applied in future circumstances. For this to occur, laws must be interpreted consistently from case to case within the judiciary, regardless of the parties involved or the experience of the judge.

In the absence of proper legal regulation, the use of precedent becomes inevitable even in systems that are not generally based on precedent. In many countries, the opinions and interpretations issued by higher courts have to replace missing legal provisions for the use by lower courts and sometimes by administrative authorities. In EECCA countries, supreme courts often issue special bulletins containing their opinions in landmark cases. The interpretations given in the rulings of constitutional courts can and should in practice be used in future cases for access to justice to become a truly efficient mechanism. The rulings in Russia Case 2 (the Nikitin Case) discussed above are good examples.

While the decisions of appeal courts play a major role in ensuring consistency among courts of first instance in both common and civil law systems, additional time and expense are required to bring a case to appeal. It is therefore important that courts of first instance are properly informed about norms of legal interpretation and have access to the latest legal information and case practice. One device that may assist in achieving judicial consistency is the advisory opinion (see below).

## Advisory opinions<sup>95</sup>

In many civil law countries, higher courts issue advisory opinions. An advisory opinion sets forth the legal opinion of a higher court on how to resolve a given legal question properly, usually in a theoretical context. Such opinions are distributed to lower court judges, as well as to lawyers and the public, to develop a consistency of legal interpretation as they try similar cases. Particularly in transition countries where judges often have incomplete access to legal information, the specific recommendations contained in the advisory opinions are critically important to the first instance courts, and are routinely referred to by judges as they prepare their legal decisions.

The legal authority of advisory opinions varies from country to country. In Moldova, for example, an advisory opinion only guides lower court judges. The advisory opinions of the Supreme Court are not “mandatory” for judges, and do not “interpret the law.”<sup>96</sup> Until recently, however, the situation in Ukraine was the opposite. There, an advisory opinion had universal binding effect.<sup>97</sup> Common law systems, such as those of England, Wales and the US, generally do not employ advisory opinions due to the case or controversy requirement.

Where advisory opinions are used, generally a single body, such as the supreme court, has the authority to issue them through a formal decision or plenary session. As opposed to a constitutional court, the supreme court’s jurisdiction extends to the application of the broad array of laws and regulations within a country, thus enabling it to issue advisory opinions on a wide variety of legal topics.

Supreme courts may issue advisory opinions on their own initiative, to rule upon lower court decisions decided inconsistently, cases imprecisely interpreting a new law, or where certain lower court decisions are frequently annulled by higher courts. In some instances, lower courts also petition the supreme court for review of specific points of law. Courts issuing the advisory opinions often consult with experts in relevant fields.

In most countries, there is wide agreement within the legal community on the importance and usefulness of advisory opinions. Lawyers regularly use them to bolster and sharpen their legal arguments, and judges view them as essential guidance in their case decision-making processes. Particularly in transition countries, a common complaint among lawyers, judges and others is that laws are voluminous, vaguely written and constantly changing. In such a situation, advisory opinions play a critical role. Advisory opinions typically address areas of law where inconsistency is greatest. In many countries, there are also few other sources of legal information, thus affording the opinions all the more deference and importance within the legal community. The opinions also stimulate and inform more in-depth legal research within the academic community.

Problems can be encountered with advisory opinions. The most pressing problem identified by practitioners in several countries is that the opinions are not binding as law. In addition, advisory opinions are often poorly distributed. After independence, due to budget constraints, the Supreme Court Bulletin of Moldova was only published sporadically and did not even contain all advisory opinions that were issued. In Ukraine, availability was somewhat better for those with access to the Internet or commercial databases. However, such resources were rarely available to the legal community in smaller cities and rural areas. Another problem is the lack of resources. The Supreme Court of Ukraine typically issued 10-15 binding interpretive opinions per year prior to June 2001.<sup>98</sup> Moreover, environmental issues seem to be avoided due to their complexity.

For example, the Moldova Supreme Court has issued only one advisory opinion on environmental law.

Considering the important role played by advisory opinions, especially in countries in transition, additional resources should be made available to expand the number of opinions issued per year, and to ensure their regular publication and dissemination.

## Timeliness of procedures

The importance of the timeliness of access to justice procedures is recognised in article 9(4) of the Aarhus Convention. Procedural loopholes allowing for significant delays in transferring cases between courts and administrative bodies make the option to use them less attractive. This significantly reduces the proportion of cases where public rather than personal interest is pursued. Even where an individual right or interest is concerned, an expectation of many years of hearings and appeals often discourages affected individuals from pursuing their interests through administrative procedures or the courts.<sup>99</sup>

In some countries, the time it takes to move a case through the process may result in a ruling that, when it finally comes, is not relevant anymore. In two of three cases on access to information in Spain it took more than six years to reach judgement. It took longer than four and a half years for Nikitin to be acquitted in the criminal case in which he was charged with treason and espionage. The delays were caused by returning the case for further investigation in violation of the presumption of innocence, lengthy procedures and the legal possibility of the prosecution to appeal a verdict of not guilty given by the lower court. Among the reasons usually given for delays in court procedures are the lack of human and technical capacities of the courts, and overburdened judges (e.g. the appellate chamber of the Tbilisi Regional Court in Georgia has only six judges, and it takes over a year to have an administrative case heard).

Another example of a delayed procedure is Moldova Case 1 (the Sarmi Park Case) where the sessions of the court were postponed twice due to the defendant’s non-appearance. Insufficient penalties for contempt of court and the lack of enforcement measures to ensure a defendant’s appearance contribute to significant delays in already lengthy court procedures. Solutions suggested by participants at a workshop for the Central Europe and EECCA region<sup>100</sup> included introducing stricter responsibility for contempt of court, imposing higher fines for non-appearance at court hearings, providing bailiffs with more efficient enforcement authority, and looking at the existing mechanisms in use in other counties (e.g. the US and the UK).

In addition, the use of other dispute mechanisms can be a speedy alternative to a lengthy court procedure. Their increasing use will have positive effects on court procedures by way of example, and by offering a real alternative (see chapter 4 above).



## Protection of persons exercising their rights

Article 3(8) of the Aarhus Convention protects persons exercising their rights as enshrined in the provisions of the Convention from being penalised, persecuted or harassed in any way for doing so. This protection extends to the exercise of the right of access to justice, and applies to protection against retribution by either authorities or private parties.

In parts of the UNECE region, the possibility that the exercise of the right to access to justice might result in physical or other direct harassment is real, and is sometimes related to the involvement of organised criminal groups. One case study involved a successful attempt aimed to make the plaintiff withdraw the suit. In Georgia Case 2 (the Vake Park Case), the plaintiff withdrew the suit at a stage when it appeared clear that he would succeed. According to the plaintiff, he and his family received threats and demands to withdraw the suit, which challenged the construction of a hotel in a public park. Although there have not been many such incidents identified for this handbook, they certainly do occur, warranting clear legal guarantees of protection for those who exercise their rights to access to justice and for those who strive to ensure that the process of access to justice is indeed fair, equitable and timely. In some jurisdictions persons seeking to thwart the course of justice are dealt with very severely indeed.

There is, however, another approach to harassment. It is broader than direct interference with a particular case and has a more strategic character. It is the increasing use of collateral civil claims, counter-suits or in some cases even criminal proceedings — sometimes on flimsy legal

grounds — against an individual or organisation related to the exercise of rights or freedoms, or actions in the public interest. Such strategic litigation (referred to as SLAPP suits) could lead to the misuse of the judicial process to attack persons exercising any right under the Convention. Trends and examples related to this barrier to public participation and access to justice are discussed in Part I, chapter 7.

## Further obstacles

Taking due account of the issues considered in this chapter can give rise to effective access to justice. Where any element is missing, however, obstacles to access to justice will arise. These obstacles may be compounded by other obstacles discussed elsewhere in the handbook, for example, the general reluctance of the courts in some countries to grant injunctive relief, and the high costs of expertise and professional legal assistance. These barriers could create a thick procedural wall between the judicial system and an individual, thus effectively denying justice and the administration of due process.

Although cases where the violation of due process requirements occurs seem to be rather exceptional, their very presence implies that, in order to ensure proper access to justice and to promote the efficient use of mechanisms, certain clarifications in the national legislation of some countries have to be made. Just as importantly, however, capacity-building efforts to train judges and public officials, programmes to raise the technical capacity of courts, and measures to ensure a proper basis for the independence of the judiciary, also have to be supported.



# Chapter 6

## Remedies

Brian Rohan and David Jacobstein

Perhaps the two most commonly discussed factors in access to justice are remedies and costs. The Aarhus Convention recognises the importance of adequate remedies in article 9(4) (costs are discussed in chapter 7). If a decision in favour of the complainant cannot result in real action to correct a wrong, the public will not seek justice through legal process. Thus, the power and ability of tribunals to provide adequate remedies are as important as any other aspect of access to justice.

### Powers of judges and administrators

The public will not make use of legal process unless those making the final decision (whether judges, administrators, arbitrators or others) have the necessary powers to make things happen in the course of proceedings and in fulfilment of their judgements. The situation is simplest in the case of administrative tribunals, even more so in internal administrative appeals, where the goal may be to invalidate a lower administrative decision. In such cases, the administrative appeal body has a range of internal levers that can be applied to make sure its decision is respected. Administrative tribunals have the option of disciplinary proceedings against authorities, for example, which are lax in issuing orders for project proponents to cease activities because their permit has been invalidated. In some cases, tribunals may issue such orders directly.

Where it is necessary to go to court, however, or where the administrative appeal needs to address issues that are external to the agency, tribunals must be equipped with stronger powers in order to reach the larger community. Such powers may be as basic as the power to compel someone to appear before the tribunal. Legal experts from Moldova have pointed out that persons called to court often ignore summonses, without suffering any hardship in respect of the case itself. This results in delays and damage to the summoned person's opponent, creating an *incentive not* to appear.<sup>101</sup> On the

other hand, courts in many countries make full use of their powers to compel persons to appear. Failure to appear may result in a decision against the summoned person in his or her absence (default), and the court may also impose personal sanctions, including fines, or in the most serious cases, imprisonment for contempt of court.

The power of the court to enforce its own judgement through contempt actions is considered a logical and inherent power of the court in some systems, without which justice could not be done. In other systems a statutory basis may be available. In any case, such power can only be effective in conjunction with a very real and practical mechanism — “officers” directly responsible to the court, who can execute a contempt judgement. Requiring a court to appeal to a related body such as the police for execution might place too much power and discretion in the hands of the latter. It is important to realise, however, that contempt powers can only be held by fully independent tribunals governed by due process and the rule of law, in order to ensure against the abuse of power.

Contempt may be civil or criminal. Legal systems as diverse as those of the US and Russia allow for the possibility of criminal liability for failure to respect a court order. Of course, administrative tribunals usually have far more limited powers, due to the fact that they are less formal and employ fewer due process safeguards. Thus, it is often necessary for administrative authorities to go to the courts to procure orders for stronger measures.

Tribunals also must have various options at their disposal to design a full and effective remedy. Traditionally, one of the main purposes of going to a tribunal was to get a judgement for damages. Disputes have become more complex, however, with the result that tribunals can often issue specific orders to remedy wrongs. In disputes over environmental issues, damages are often inappropriate, and time is often of the essence. Thus, the extraordinary powers of courts and administrative tribunals have become relatively more important — especially the power

to issue injunctions. The Aarhus Convention recognises the importance of injunctive relief by making specific reference to it. That and other remedies are discussed in more detail below.

## Enforcement of judgements

Legal systems must be able to ensure that the final decisions of tribunals are respected and followed. There are many issues at work in the enforcement of judgements, which can only briefly be mentioned here. One such issue is geographical jurisdiction. It may be difficult for a decision in a particular state or locality to be implemented outside that area. As international standards for access to justice become more accepted, *inter alia*, through the implementation of the Aarhus Convention, the enforcement of judgements across borders (giving them full faith and credit) should become easier. Another issue is whether the tribunal maintains jurisdiction over the enforcement of its judgement, or whether a complainant must use subsequent proceedings for enforcement. But the potential for irreversible damage when dealing with environmental matters is a strong argument for ensuring enhanced powers of tribunals to enforce their judgements directly.

## Injunctions as a remedy under the Aarhus Convention

### What is an injunction?

An injunction is a legal mechanism, usually taken within the context of a court proceeding, to require an action, or more commonly to halt an action or set of activities somehow connected to the court proceeding. An injunction is often a pivotal aspect of an environmental case. Unlike commercial law disputes where one party claims monetary damages from another party, environmental disputes often involve proposed activities that, if undertaken, would produce an irreversible environmental impact. In such cases, monetary compensation is insufficient. The only way that a remedy can ensure complete relief is to prohibit the activity.<sup>102</sup>

### How does an injunction work?

An injunction typically works by preserving the underlying situation or set of facts (*status quo*) until a final court decision is issued. For example, a government or NGO may bring a legal challenge to a developer's plan to erect a block of flats within a city park, claiming that the developer failed to comply with public participation requirements. However, unless the developer's construction activities are stopped while the lawsuit proceeds, the ultimate court decision may be rendered meaningless.

At the beginning of proceedings, a court may therefore

issue an injunction — an enforceable order prohibiting a specified activity, such as any further construction of the flats. By prohibiting an action during the entire duration of a court proceeding, an injunction ensures that complete relief will be possible when a final decision is issued. A defendant could not employ a strategy that seeks to delay, on the one hand, legal proceedings through all available means while, on the other hand, implementing its potentially illegal activity before the court could issue a final decision.

### Types of injunctions: Temporary versus final

In many countries, including the UK, Ireland, Slovenia and Austria, courts may issue both “temporary” and “final” (or “permanent”) injunctions.<sup>103</sup> A temporary injunction — the primary focus of this discussion — is issued at an early phase in the legal proceedings in order to preserve the matter in dispute for the duration of the proceedings. A final injunction, on the other hand, would be incorporated into the court's final decision, for example, ordering that a block of flats could never be built in the location and manner proposed by the developer, due to incompatibility with green space and planning laws. In essence, the final injunction is an aspect of the court's final ruling, rather than a separate, interim order. However, when appropriate, a court may incorporate the temporary injunction into its final ruling, in whole or in part.

### Parties involved in an injunction

Injunctions may be used among a variety of parties, with variations from country to country. Usually, the government can seek an injunction when challenging a private party's action. Also, an NGO may seek an injunction against a private party. In a number of countries, NGOs may also seek an injunction against the government when the government is the party alleged to be undertaking an illegal action.

### The broad impact of injunctions

Injunctive relief is of particular significance in environmental cases. Environmental cases typically include two components: an ecological question or fact pattern, and a set of legal requirements. The ecological question, for example, may be a proposed construction in an open space, or a potential discharge of pollutants into the water or air. The legal requirements in such a situation may include holding public hearings, releasing information about planned activities, getting the approval of environmental ministries or other public authorities, or performing an EIA.

Injunctive relief, specifically a temporary injunction, acts to prevent the alteration of the ecological *status quo* while legal requirements are being scrutinised, thus increasing the focus on these legal requirements. This increased focus assures the integrity and validity of the

process in each specific case, and also establishes a norm of behaviour with all sectors of society understanding that legal procedures are an integral part of the decision-making process, rather than mere nuisances or formalities to be ignored until after work has commenced.

A typical example of how an injunction can preserve the ecological status quo and maintain focus on the legal requirements in an environmental lawsuit is Germany Case 4 (the Nature Preserve Case). In this case, a private investor applied in 1994 for a planning exemption to allow him to develop a section of a nature reserve into one-family homes and commercial buildings. He initially applied to build 46 houses. He was at first denied permission, but after reducing his project by half, was granted permission by the Brandenburg State Public Administration to build in the protected area. The conservation group NABU opposed the development during the public participation procedure related to the initial 46-unit proposal. Subsequently, the group was not informed about a second round in the public participation process related to the revised 23-unit proposal. NABU sued the Brandenburg State Public Administration both for failure to implement its public participation obligations properly and for issuing an exemption of unlawful size. The court battle was protracted and the first instance decision was not issued for three years. However, the environmental group received a temporary injunction early in the proceedings, preventing any development or construction from occurring in the nature reserve during the entire three-year period.

NABU eventually won the case. Perhaps more importantly, the injunction ensured that the victory accomplished its objective, because the investor could not begin construction while the court case was pending, and the nature reserve remained untouched. Further, by preserving the status quo, the injunction kept the final outcome of the case in suspense, which increased the interest of the local community, who followed the case and saw important legal requirements played out before them. Had construction begun while the case proceeded, the legal proceedings might have been easily dismissed by the public as irrelevant to the method by which decisions are “really” made.

Injunctions also can significantly reduce overall court expenses and greatly increase the timeliness of legal decisions. Netherlands Case 2 (the “Indispensable” Pesticides Case) clearly demonstrates these points. The case involved a variety of pesticides that were illegal under Dutch and EU law, but for which a special exemption was given through a ministerial regulation, on the theory that they were “indispensable” to Dutch agriculture. During the first instance trial, the administrative court provided injunctive relief to the plaintiff, preventing the pesticides from being used during the spraying season. After the first instance victory, the agricultural interests successfully lobbied for a new law to exempt the pesticides. This was significant because any challenge to the validity of the law would be heard not in

administrative court, but in civil court, which, for a variety of reasons, is much less likely to grant an injunction.

As an aspect of the new law, however, there was an administrative requirement that only those pesticides for which new applications had been submitted would be considered registered under the law. When the list of pesticides with completed applications was published, the plaintiff took the view that this amounted to an “administrative decision” — an affirmative act to register these pesticides — and proceeded to challenge this decision in administrative court. Informed that this case would be heard in administrative court, and realising that another injunction was likely, the ministry announced one day before the hearing that none of the pesticides could be used that year because it realised upon further review that their applications for the new legal exemption were incomplete.<sup>104</sup>

In order to save face, the ministry backed down in effect from defending the new law, because it anticipated an injunction would be granted. Clearly, the ministry was prepared to defend the new law in civil court. With no injunction in place, spraying could have begun, even while the civil court case proceeded.

## Making injunctive relief a reality among all parties to the Aarhus Convention

Recognising the unique aspects of the injunction in environmental litigation, article 9(4) of the Aarhus Convention specifically states that the remedies of access to justice procedures under articles 9(1), 9(2) and 9(3) shall include injunctive relief. However, practice and experience with injunctive relief vary greatly throughout the region. In many countries that are signatories or parties to the Convention, injunctions are structured with vague provisions or other procedural requirements that greatly curtail or eliminate their effectiveness. The challenge for implementation is to ensure a coherent legal framework for injunctive relief, so that it is available consistently and employed effectively in all cases arising under article 9.

## Obstacles to effective injunction

The case studies highlight a number of successful uses of injunctive relief, as well as many instances of current obstacles to effective usage. Some obstacles render injunctions too expensive or financially risky, while other systemic problems generally discourage their use altogether.

### Bond payment

When issuing an injunction, courts in many countries may require the plaintiff to post a bond to cover the losses of the party that is forced to stop its activities.<sup>105</sup> If the plaintiff ultimately loses its case, the bond is then used to offset the damages. Typically, these damages are both difficult to calculate and potentially enormous, well beyond

the means of NGOs and ordinary citizens, thus making this requirement the single greatest obstacle to the effective use of injunction in many UNECE countries.

In Russia, for example, there is no formula by which the bond amount is calculated. The decision is left to the judge's discretion, with no guidelines to inform his calculations. There is not even a standard when the bond itself is required: a defendant must first request it, and then the court, in its discretion, determines whether or not to require it. Again, there are no standards to guide the judge in this determination. The situation is the same in other EECCA countries, with the result that complainants are often prevented from seeking an injunction.

### **Threat of defendant lawsuits**

Closely related to the problem of bond requirements is the possibility in many countries that a defendant whose activities have been halted by an injunction may sue the plaintiff for damages if the plaintiff loses the case. The magnitude and uncertainty of such damages are as onerous for complainants as the bond requirement, creating another major financial obstacle to the effective use of injunction.

For example, in Moldova Case 1 (the Sarma Park Case), the first instance trial court granted an injunction at the request of the plaintiff. However, upon appeal to the Court of Appeals and the Supreme Court, the defendant made it clear that, if the plaintiff requested another injunction but ultimately lost the case, it would bring a legal action to "request payment of damages." Faced with this potentially enormous financial liability, the plaintiff refrained from requesting the injunction.<sup>106</sup>

Similarly, in Georgia Case 2 (the Vake Park Case), lawyers representing the plaintiff hoped to secure an injunction against a company seeking to construct a hotel in a park in Tbilisi. However, the plaintiff feared that the defendant would sue him for damages if the case was eventually lost. The potential damages resulting from a delay in completing and operating a 16-storey hotel were unknown, but potentially enormous. For this reason, the client refused to pursue an injunction.<sup>107</sup>

### **Lack of judicial capacity and independence**

In addition to a lack of standards to guide consistent practice, other common hindrances to the effective use of injunctions include a lack of understanding about injunctions within the judiciary, and a lack of judicial independence (see chapter 5 above). Judges in many countries, especially those in courts of first instance where injunction cases are usually heard, may be unfamiliar with its use. While the process of appeal can and does act as an important check on lower court decisions, appeal courts in many countries are also faced with relatively undeveloped law and practice regarding injunctions, making the appeal process an unsure mechanism in ensuring the fair use of

injunctive relief. In many countries, this problem is compounded by the judiciary's unfamiliarity with environmental law in general.

### **Lack of enforcement**

Another obstacle that hinders effective injunctive relief is the lack of proper enforcement of issued injunctions. While courts issue injunctions, a bailiff, the police, or another government official is usually responsible for ensuring that injunctions are obeyed and that those who violate an injunction order are punished. In several countries, however, these agents do not perform their function, rendering the injunctions meaningless.

In Armenia Case 1 (the Victory Park Case), injunctive relief was not available to the Environmental Public Advocacy Center in its fight to prevent illegal construction in Victory Park. Furthermore, even in countries where injunctions are enforced, this enforcement is often delayed, resulting in needless environmental harm.<sup>108</sup> In the Netherlands, enforcement of an injunction issued by an administrative court is often left to the administrative agency with jurisdiction over the matter. If the agency is unwilling or slow to require compliance with the injunction, the plaintiff must return to the administrative court to compel the agency to take enforcement steps, or must go to the civil court to ask for an order compelling compliance with the injunction. These additional steps result in further expense and delay before an injunction is enforced.

### **Strategies for effective injunctive relief**

While the obstacles described above are varied and complex, there are a number of concrete steps that can be considered to ensure coherent and effective injunctive relief under article 9(4). Considering the magnitude of the obstacle to citizen advocacy posed by bond requirements and defendant lawsuits, these provisions should be a primary target of reform.

### **Eliminating the bond and defendant lawsuit barriers**

The simplest approach would be to eliminate bond and defendant lawsuit provisions altogether in countries where they still exist. In many countries with well-developed injunction practice, bond requirements and defendant lawsuits are not in use. Another option is to retain these provisions, but to establish fixed limits on the amount of bond or potential defendant damage recoverable in a public interest case. For example, in order to obtain an injunction, a citizen or NGO could be required to post a bond of 50 minimum salaries. Such an amount, while not insignificant, is within the ability of many public organisations and advocates. Known as the "symbolic bond" approach, such an appropriate fixed limit would serve to ensure that plaintiffs only sought injunctions in pressing cases where they



believe they have a strong chance of prevailing on the merits in the final decision, thus addressing one concern that the bond and lawsuit provisions were presumably designed to alleviate.

In addition to limiting the cases in which plaintiffs would seek injunctions, however, bond and lawsuit requirements are also intended to address another issue. An enterprise that is forced by injunction to cease its activities suffers large financial losses as a consequence, and is often otherwise unable to recover these losses if it eventually wins on the merits. In seriously considering the elimination or reduction of bond and defendant lawsuit provisions, this issue must also be addressed.

Many countries have responded to this problem by developing precise legal standards for when an injunction may or may not be issued. While the wording of these standards varies from country to country, the end result is the same. Injunctions are used in limited circumstances, when the potential for irreversible harm is great, and only after a variety of factors, including economic impact, are considered.

In Hungary, an injunction may be issued (1) if it is “indispensable” to avert damages; (2) to avoid a change in the factual basis of the legal proceedings; or (3) if necessary in other instances deserving special attention. If the court finds that any one of these conditions is satisfied prior to issuing the injunction, it must further find that the harm caused by the injunction will not exceed the advantage gained by its issuance.<sup>109</sup> This legal test allows the court the flexibility to decide whether an injunction is appropriate on a case-by-case basis, while at the same time creating a standard that each party to the proceeding can understand and use to argue whether the injunction is necessary.

In the US, courts have developed various methods to balance the interests involved in an injunction proceeding. According to the US Supreme Court, the plaintiff must show that, if the injunction is not issued, he will suffer “irreparable injury” and that he is likely to prevail on the merits. However, courts must weigh carefully the interests of both plaintiff and defendant in making their determination. Interpreting this standard, many US courts use a four-part test: 1) the significance of the threat of irreparable harm to the plaintiff if the injunction is not issued; 2) the balance between this harm and the injury that granting the injunction would inflict on the defendant; 3) the probability that the plaintiff will succeed on the merits; and 4) the public interest.<sup>110</sup>

In the Netherlands, a large number of judges have grappled over the years with the merits of issuing an injunction in a wide variety of cases. Thus, according to a Dutch environmental lawyer, a sort of “case law” system has developed, where both judges and lawyers know the type of case where an injunction is appropriate. The standard employed by a Dutch judge is roughly akin to the US

standard in assessing 1) whether there is justification to take “immediate measures”; 2) whether action is necessary to maintain a “balance of interests” that may otherwise be altered in the absence of an injunction; 3) whether the probable duration of the case would impede justice if an injunction is not used; and 4) whether the plaintiff is likely to succeed on the merits. While unwritten, the test is clear and, most importantly, is well understood within the Dutch legal community, which compels a high degree of consistency and accountability.<sup>111</sup>

Recognising the potential impact on the party ordered by injunction to cease an economic activity, these standards function on two levels. First, they reflect a social choice expressed through law that, when an injunction is employed, the risk of economic harm to the party ordered to cease its operations will be greatly outweighed by other important factors and therefore can be tolerated. Second, these standards provide a consistent and transparent test by which the legal system can determine when an injunction is appropriate. In countries using these or similar standards, bond or defendant lawsuit provisions are not employed. The legal standards are in and of themselves the manner in which these societies balance interests and manage the risk of economic harm to the defendant. Consistently implemented, these standards thus enable the effective application of injunctive relief in all appropriate instances without imposing unreasonable financial burdens on those plaintiffs seeking it.

Georgia provides another approach to eliminating bond and defendant lawsuit problems. Article 29 of the new Georgian Code of Administrative Procedure states: “Bringing of an action in the [administrative] court shall result in the suspension of the concerned administrative act.”<sup>112</sup> Considering that an underlying administrative act is involved in the vast majority of environmental law cases, this provision serves as an automatic injunction. For example, Russia Case 3 (the Shrinking Park Case), Germany Case 4 (the Nature Preserve Case), Moldova Case 1 (the Sarmi Park Case) and the Netherlands Case 2 (the “Indispensable” Pesticides Case) all involved an underlying government decree, permit or other administrative act that enabled an activity potentially damaging to the environment to occur. Under Georgian law, by beginning a case in an administrative court that challenges the underlying administrative act, the requisite legality of the activity is also removed, thus requiring that the activity itself ceases. This automatic injunction remains in place until the final court decision, and, since the injunction actually directly refers to an administrative act rather than the economic activity enabled by such an act, there is no bond requirement, and no possibility of a defendant lawsuit for damages.

The above approaches provide concrete, focused means by which bond and defendant lawsuit provisions can be reformed in the use of injunctions. However, broad-

er efforts are also necessary, such as focused training to increase judicial understanding of how injunctions operate, training for court personnel responsible for enforcing injunctions and measures to increase judicial independence so that courts are empowered to use this instrument to its full potential. Some of these measures can be accomplished in the short term through revisions to specific codes or training programmes, and others are long-term, structural reform efforts. Both short and long-term approaches should be employed to ensure that all countries becoming a party to the Convention can employ injunctions that are effective and readily available.

## Damages

The main problem in the use of damage remedies in environmental cases is that most environmental damage is irremediable. By putting a price on natural resources and the environment, some might think their destruction is ensured. Nevertheless, damage remedies where incidental loss to personal property or other interests occurs are a very useful tool in encouraging people to bring environmental cases forward. As Kramer stated:

“As it is not known how the public (general) interest ‘environment’ can best be represented in dispute settlement procedures, the second-best solution consists in counting on the selfishness of citizens and allowing them, when defending their own interests, also to raise arguments and provisions which serve to protect the environment.”<sup>113</sup>

The issue of damages is one that deserves further study. One point can be made here related to the possibil-

ity of “non-material” damages. In some Western legal systems, most notably that of the US, courts have the possibility to award punitive damages, that is, damages that are not directly related to the actual harm caused, but are imposed to punish particularly offensive conduct or to deter similar behaviour by making an example. Many legal systems do not allow the award of punitive damages. Nevertheless, even in countries where punitive damages are not allowed, a similar mechanism may be available. This is an award for “moral” damages. Moral damage awards are in theory related to actual harm suffered, and therefore are not punitive, but the harm is non-material in the sense that it involves psychological harm or moral offence. As this sort of harm is difficult to quantify, the tribunal has wide latitude in effect to determine the amount of moral damages, and can award an amount that has the same punishing or deterrent effect of punitive damages in other jurisdictions. An example of such a case from Ukraine<sup>114</sup> forms part of the case studies. Moral damage cases also have the advantage of a developed practice with respect to quantification. Novel situations that might pose difficulties of quantification for material damages could be at least partially addressed through moral damage actions. Another example from Ukraine<sup>115</sup> involved residents of the “sanitary zone” around a factory using extremely hazardous chemicals in its operations, who learned about serious environmental violations at the plant. While it would have been difficult to prove particular exposures, it was easy to establish that the residents were placed in constant fear of suffering severe health problems. The possible need to defend against a claim for moral damages may often be an incentive for operators of such facilities to comply fully with environmental regulations.



# Chapter 7

## Financial and other barriers

Lynn Sferrazza

Financial considerations can be an effective barrier to access to justice in many cases. The influence of costs on the decision whether to seek justice is obvious. Many countries have fashioned rules for the reduction of cost barriers, including waivers and fee shifting. In addition, governments can limit the opportunities for organisations to gain access to justice through restrictions on NGO registration. This chapter examines some of the issues and some of the mechanisms that have been developed to reduce financial and other barriers to access to justice. Further information on financial barriers related to injunction bonds and defendant lawsuits appears in Part I, chapter 6 above.

### Court fees

Tariffs or court fees to initiate a lawsuit can effectively prevent members of the public and NGOs from accessing the courts. Court fees for administrative cases, as opposed to civil cases, are generally not prohibitively expensive. In some countries, such as Poland,<sup>116</sup> the costs of administrative proceedings are relatively low compared to civil proceedings, which is helpful to NGOs challenging EIAs and bringing other kinds of administrative cases. Some countries provide for a waiver of, or reduced, administrative fees (e.g. Estonia and Hungary), which is limited to classes of individuals set forth in national legislation.<sup>117</sup> In Slovakia, environmental organisations, foundations, and charitable and humanitarian organisations are exempt from paying administrative court fees altogether.<sup>118</sup> However, Croatian law specifically excludes NGOs from such a waiver, and it is available to individuals only.<sup>119</sup>

Civil cases present a greater economic barrier than administrative cases. Many Central European and EECCA countries charge a percentage of damages to initiate a civil suit (see Part 1, chapter 6 on injunctions). For example, in Bulgaria and Hungary, court fees in civil procedure cases are equal to 4 percent and 6 percent, respectively, of the requested or estimated damages.<sup>120</sup> Likewise, in Slovenia, fees are a percentage of the value of the subject matter of

the litigation and can be quite high.<sup>121</sup> Often, these costs can amount to several months of the average wage.

Administrative and civil fees are all the more onerous for plaintiffs because they often must be paid upfront. Although a plaintiff may be able to recover the fees should he or she prevail in the litigation, as discussed below, the up-front cost often prevents a party from bringing a case to court. One case in Ukraine involving thousands of young children in villages surrounding a mine site who were exposed to excess levels of fluoride in their drinking water and suffered severe health problems, could not go forward.<sup>122</sup> Even though Ukraine recently changed its law, reducing civil court fees from 5 percent to 1 percent of damages, initiation of this suit, where damages are high, would be close to USD 1,000, an amount beyond the means of the local villagers.

Clearly, these issues need to be addressed by national legislation, and some countries have taken steps to eliminate these barriers. Poland has taken steps to reduce the burden of administrative court costs by initiating a “one-way shift,” whereby a public authority may be ordered by an administrative court to pay the other party’s court cost, but public authorities are not entitled to have their costs recovered. These are positive steps forward and other countries can take similar steps. In order to eliminate financial barriers, each country should promulgate comprehensive legislation eliminating or reducing administrative and civil costs up-front.

### Costs of experts

Fees for expert testimony can be a financial barrier in many cases. In some countries, such as Spain, courts may assume the costs of experts who are necessary to advise the court and aid it in coming to a verdict.<sup>123</sup> Judges often have the discretion to decide which party to a dispute should bear the costs of experts. A creative solution on how to arrange for the inexpensive testimony of experts was found in United States Case 1 (the Telephone Case). In

this case, brought by the University of Oregon's Environmental Law Clinic in the mid-1980s, the practical barrier of NGOs or individuals being able to arrange expert witnesses to testify on their side in court was overcome. The plaintiffs faced a problem to find experts to testify on their side about the scientific inadequacy of the environmental impact statement. Several were willing to testify, but could not spend the time or money to fly to Oregon for the trial, and their clients could not afford to pay them even if they had the time. The judge in this case proposed an interesting solution — for several witnesses to testify by telephone. At first, government lawyers objected, saying that they wanted to be able to cross-examine the expert witnesses in person, in front of the court. But the court accepted the argument that the quality of a scientist's testimony and evidence has little or nothing to do with how his face or body language appears during a court appearance. Arrangements were made for a "telephone trial" and the clinic put on nine of their 11 witnesses in this manner.

## Legal aid

Some European countries have promulgated laws that defray attorney fees and other costs and expenses, and negate the disincentive to bring public interest actions. For example, German law provides that a party may apply for legal aid if it is unable to bear the costs of the action, and failure to pursue or defend the matter in court would contravene the general public interest.<sup>124</sup> In order to receive legal aid, the lawsuit must have a reasonable prospect of success and must not be deemed frivolous.<sup>125</sup>

United Kingdom Case 2 (the Agricultural Storage Case) illustrates the benefits of free or government subsidised legal assistance. The British legal aid scheme was replaced in 2000 by the Community Legal Service Fund of the Legal Services Commissions. The new system introduces additional requirements for eligibility and ensures that the maximum recovery of legal costs will be achieved. In the Netherlands, members of the public can apply for free legal assistance from the environmental branch of a public litigation service.

Public interest environmental law organisations with donor support operate in many Central European and EECCA countries. Examples can be found in Bulgaria, the Czech Republic, Hungary, FYR Macedonia, Moldova, Poland, Russia, Slovakia, Ukraine and Uzbekistan, among others. They may offer free legal services to the public in environmental cases, or in some cases may employ a sliding fee scale based on the financial resources of the client.

In addition, law firms or individual lawyers in many countries have a professional duty to provide free or low-cost legal services to those who cannot afford them. This pro bono requirement can be addressed in many ways, one of which is to take on public interest environmental cases. In some jurisdictions, care must be given to ensure

that legal requirements are met. In England and Ireland, for example, the tort of maintenance can occur under certain circumstances where an outsider to a matter under litigation gives support to one side or the other. Courts in Ireland have held that the tort of maintenance does not apply when there is a community of interests, as would occur in most public interest cases. In cases of compensation for environmental harm, however, the outcome might be different.

## Fee shifting

While court fees may present a barrier, as discussed above, the greater cost comes if the NGO is paying attorney market rates and/or if expert testimony is required, as is often the case. In this event, financial obligations can rise dramatically. In some countries (e.g. Moldova), plaintiffs must also pay witnesses to appear. Thus a party's own litigation costs may be very high. In addition, because most European countries follow a "loser pays winner" system, a losing party may be required to pay the attorney fees and costs of the prevailing party as well. In the American system, each side generally pays its own costs. Each system presents obstacles as well as opportunities for access to justice. With some legislative modifications, as discussed below, each system can create incentives for public interest litigation.

In the European "loser pays" system, the loser generally pays the winner's court costs and attorney and expert fees. The most obvious difficulty with this system is, should an NGO lose a suit, fees are often very high. While this system deters frivolous lawsuits, it also deters meritorious lawsuits and/or suits that present novel questions, due to a plaintiff's fear of losing and being faced with a large fee. Nonetheless, this system could be beneficial to NGOs because lawyers could be encouraged to take meritorious cases pro bono, with the knowledge that they would be compensated if they won the action.

Several problems are presented, however, stemming from national legislation in various countries. In Ukraine, for example, a provision of the Code of Civil Procedure states that, if an advocate provides legal services free of charge, the court may order the losing party to pay the equivalent of the cost of attorney fees — not to the prevailing party, but to the state.<sup>126</sup> Legislation in Bulgaria presents similar barriers. There, a victorious party cannot be awarded costs in an administrative case, and can only recover partial fees and expenses in civil cases. These laws negate the incentive built into the loser pays system — fee recovery if victorious — by not allowing fee recovery for pro bono work or only allowing partial recovery.

Even if an NGO is victorious and granted fee recovery by the courts, implementation of the fee award remains an overriding issue in many countries. For example, in Ukraine Case 2 (the Oilfield Information Case), plaintiffs prevailed

in their action but faced difficulties in collecting fees and costs from the defendants (the State Geology Committee) and ultimately received very little reimbursement.

The loser pays system presents opportunities for NGOs to the extent that it can encourage attorneys to take on pro bono cases that attorneys feel are meritorious. This can be achieved by promulgating new legislation in countries with loser pays systems, such as Germany, which provide for legal aid in public interest cases. In addition, laws preventing fee collection (e.g. Ukraine and Bulgaria) need to be revised and the implementation of a fee award must be guaranteed.

The American system presents different opportunities and obstacles. In the American system, each side generally pays its own costs. Clearly, one advantage of the system is that an NGO that is unsure of ultimately prevailing in a case will not be dissuaded from bringing the case because of fear of being slapped with fees.

In addition, specific legislation provides for fee shifting in cases against the federal government that allow an NGO or other person to recover fees and costs if they prevail against the government, but does not permit the government to recover fees and costs if it prevails. There are approximately 150 federal fee-shifting statutes, including 16 major federal environmental statutes. Most of the environmental fee-shifting statutes provide as follows:

“The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such an award is appropriate.”

Under the Equal Access to Justice Act — which provides for fee shifting in any suit against the federal government (not only environmental suits) — a party that prevails against the federal government, whether defendant or plaintiff, may recover attorneys’ fees up to a specified cap, along with expert and other costs, if the prevailing party can demonstrate that the government’s position was not substantially justified.

In all these fee-shifting provisions, the stated goal of the US Congress was to encourage citizen lawsuits in order to achieve compliance with federal statutory policies. The statutes seek to create an incentive for commercial and public interest lawyers to represent citizens pro bono by providing a structure where lawyers can be reimbursed for their legal services if victorious. Reimbursement of fees and costs is not guaranteed, however, and the statutes expressly delegate discretion to the courts to determine whether a fee award will be granted and what the amount would be.

Thus, the American system creates an incentive for commercial and public interest lawyers to provide pro bono services to NGOs and citizen groups because lawyers may recover fees for their services if victorious. However, the cost of litigation, including the hiring of experts and other standard expenses, which can be quite high, still

presents a barrier or disincentive to bring litigation because these costs must be fronted by the plaintiff. In addition, even if a plaintiff prevails, the amount of fee recovery is within the discretion of the court and plaintiffs may not recover all of their expenses.

These problems aside, the American system has fostered public interest litigation and many public interest law organisations have come to rely on fee shifting to sustain their organisations. Fee shifting has been liberally allowed by most courts in public interest litigation, granting fee and cost recovery in cases where the parties settle in a manner favourable to the plaintiff and in cases where the plaintiff has partially prevailed.

Until recently, courts have even allowed fee and cost recovery under the “catalyst theory,” whereby fee recovery is allowed in instances where the plaintiff’s lawsuit compelled the defendant to comply voluntarily with the plaintiff’s demands in the action. The “catalyst theory” was recently overturned by a US Supreme Court holding that voluntary actions are not enough to compel a fee award. Instead, there must be a court-ordered consent decree, or some kind of judicially sanctioned change in the relationship between the parties, in order for a court to grant a fee award.<sup>127</sup> This case is a big blow to American NGOs, because lawsuits may often go on for years before the defendant “voluntarily” agrees to change its course of action. Until now, courts recognised that such “voluntary” action would not have occurred but for the plaintiff’s suit and many courts granted fees and costs based on this premise.

Both the American system and the European loser pays system have the potential to foster public interest litigation. The loser pays system seeks to make the winner whole and can be implemented with a degree of flexibility that need not discourage public interest litigation. The German law providing for legal aid in public interest cases is an excellent example of this.

Another incentive for public interest litigation is the “one-way fee shift.” According to this concept, which only applies to a certain type of public interest litigation, including environmental or human rights cases, plaintiffs can receive costs under the loser pays system when they prevail, but do not have to pay if they lose, so long as the case had reasonable grounds. Thus, plaintiffs would not be penalised for failing to prevail in an action that presents a question of general public interest.

Another method is simply to create legislation that exempts public interest plaintiffs from fee shifting altogether so that NGOs would not get slapped with fees if they lost a suit. However, in this event, NGOs would also not benefit from recovering costs if they prevailed. Thus, simply exempting public interest litigation from fee shifting relieves some of the risk but does nothing to create incentives for lawyers to take on public interest suits and foster public interest litigation. The one-way shift best achieves this result.

In short, as with administrative and civil court fees, legislation is necessary to temper the sometimes harsh results of a loser pays system and foster the development of public interest advocacy.

## Aggregating small claims

The pervasive and incremental nature of environmental problems often makes it difficult for them to be taken up through traditional access to justice means. The burden in terms of time and money in bringing forward a small claim often outweighs the particular harm, but if numerous small claims can be aggregated in some way, then a real problem can be addressed. In some jurisdictions, a tribunal can certify representatives of a particular group of persons in similar circumstances to bring forward a case on behalf of the group (the class action). Specific rules govern the notification of other persons who might classify for the group, their options for opting in or out, and the preclusive effect of judgements in the class action vis-à-vis separate claims, among other issues. *Actio popularis* (see Part I, chapter 4) may also provide a mechanism for addressing large numbers of small claims.

## Restrictions on NGOs

Even under the Aarhus Convention, which requires recognition of unregistered groups in some circumstances, it is often important for an NGO to acquire the status of a “juridical person” because without this the NGO does not have certain rights, including the right to challenge an administrative decision. The registration process, tax status and other restrictions imposed on NGOs in many countries deter people from forming NGOs.

In Ukraine, in order to acquire the status of a juridical person, an organisation must register with the state. Procedures of registration vary depending on the type of entity. Only a fully registered juridical person, for example, can obtain a seal (necessary to make its documents official), open a bank account, enter into contracts or be a party to litigation. A non-registered entity does not have any of these powers.

In order to be fully registered, an NGO must: (1) hold

a meeting of those who want to join the NGO and pass a decision on creating the NGO; (2) create a charter; and (3) obtain approval of this charter from the Ministry of Justice (for National and International NGOs) or its local department (local NGOs).

After these procedures are complete, an NGO is given one month only to register with eight other government agencies.<sup>128</sup> Unless an NGO completes these procedures within one month after its registration with the Ministry (or local department) of Justice, the head of the NGO may be charged with an administrative offence (misdemeanour).

Assuming an NGO gets through this process, the NGO must submit quarterly reports on its activities to the state tax authority and other specified bodies.

## Taxation

While NGOs in many countries enjoy preferential tax treatment, some countries impose significant tax burdens on NGO activities. Certain activities considered normal for NGOs in some countries would possibly endanger tax-free status in others.

In Ukraine, for example, attorneys fees and costs recovered after prevailing in a lawsuit, or the sale of a book on environmental rights prepared by an NGO, may be considered profitable income, and may result in the organisation being removed from the Register of Non-Commercial Organisations, which would oblige it to pay income tax. Further, due to the restrictions of value-added tax (VAT) law, NGOs usually do not engage in selling goods or providing services, fearing exclusion from the register. This prevents NGOs from raising funds through the sale of products such as T-shirts, calendars, and other items, a practice regularly engaged in by NGOs in many countries. Finally, donations to NGOs are limited, since they must pay income tax on any portion of the donation exceeding 4 percent of their total funds.

In large parts of the UNECE region, however, tax laws provide incentives for the formation of public interest NGOs, and for individuals and corporations to provide donations to them. These long-standing laws are fully supported by government and the citizenry and demonstrate the important role played by NGOs in civil society.

# Chapter 8

## Strategic lawsuits against public participation

Jennifer Gleason

Citizens and NGOs in many UNECE countries are feeling the impact of a disturbing new trend — they are getting sued for presenting testimony at public hearings, collecting signatures on petitions, filing lawsuits when environmental and other laws are violated, or otherwise speaking out about issues of public interest.<sup>129</sup> These lawsuits are referred to as “strategic lawsuits against public participation” (SLAPPs).<sup>130</sup> SLAPPs are obstacles to ensuring that citizens have access to justice and in implementing the Aarhus Convention. This section presents a brief general overview of SLAPPs.

It is well documented that SLAPPs are used to deter public participation in the US and there is evidence that the use of SLAPPs is spreading to Canada, the UK, Russia and Kazakhstan. It is likely that SLAPPs are used in many other European countries, although they may not yet be recognised as a specific legal tool used by opponents to public participation.

### What are SLAPPs?

A SLAPP is a type of civil lawsuit filed against an NGO or individual for speaking out about an issue of public interest.<sup>131</sup>

SLAPPs are successfully used to deter people from exercising the right to speak out about issues of public interest and the right to ask the government to correct a wrong. SLAPPs have an impact on the democratic process by decreasing citizen willingness to enforce rights, to participate in policy-making, or to act as “watchdog” over government agencies. The targets of SLAPPs must often endure several expensive years of litigation before a court rules in their favour.

Courts in at least one UNECE country view SLAPPs as efforts to penalise the exercise of constitutionally protected liberties. US courts that dismiss SLAPPs often cite the petition clause of the First Amendment of the US Constitution, which guarantees “the right to petition the Government for a redress of grievances.”<sup>132</sup>

### SLAPPs identified in case studies

In at least two case studies, citizens attempting to participate in government decision-making were targets of SLAPPs. In Kazakh Case 3 (the Excessive Fees Case), an individual spoke out at a public hearing about pollution discharged by a company. The citizen’s testimony contrasted with the testimony given by a representative of a laboratory hired by the company. The laboratory filed a lawsuit against the individual, claiming the individual injured the laboratory’s reputation. Ultimately, the claim was unresolved, but the citizen had to pay for representation in the case. Cases like this will discourage people from speaking out at public hearings.

In Russia Case 2 (the Nikitin Case), the Russian government charged a former captain in the Russian Navy with treason through espionage, disclosure of state secrets and other crimes for preparing a report that included information about the possible radiation hazards of some Russian submarines and nuclear waste storage sites. Although Nikitin was ultimately acquitted, he spent five years fighting the charges (at considerable expense). During part of this period, Nikitin was held in custody. Even when he was not in custody, his movements were severely restricted. Nikitin’s case is an extreme example of the harassment citizens may face for speaking out, but it is not the only example. Certainly other citizens will think twice about advocating for the environment after Nikitin’s experience.

### Responding to SLAPPs — SLAPPbacks

In order to deter SLAPPs, Pring and Canan suggest that targets should “SLAPPback.” They state, “[t]he most promising prevention and cure for the SLAPP phenomenon ... is ... the ‘SLAPPback’: a countersuit in which the targets turn the tables and sue the filers for the injuries and losses caused by the SLAPP.”<sup>133</sup> Violation of constitutional or other rights, abuse of process or tort claims, such as out-



geous conduct, are examples of legal theories that can be used in filing SLAPPbacks.<sup>134</sup>

Perhaps the two most common claims in a SLAPPback are malicious prosecution and abuse of process. Many SLAPPback cases end in settlements, so the final outcome is not reported.<sup>135</sup>

## Legislative responses to SLAPPs

One way to ensure that SLAPPs do not continue to deter public participation is to enact anti-SLAPP laws. Some UNECE and other countries have adopted laws discouraging SLAPPs.<sup>136</sup> It is in the interest of governments to pass anti-SLAPP laws to ensure that citizens are able to participate in the government decision-making process and to stop filers of SLAPPs from misusing courts to deter citizens from participating in government. SLAPP filers are often trying to silence citizens and take a debate out of city hall, where many people can participate in the discussion and where elected officials will make a decision. Anti-SLAPP legislation needs to protect targets without interfering with the right to bring grievances to court.

Several groups came together to draft a model anti-SLAPP bill for the US.<sup>137</sup> This bill could serve as a model to use in drafting anti-SLAPP bills in other UNECE countries. The bill states in part:

“Acts in furtherance of the constitutional right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating in the processes of government, shall be immune from civil liability, regardless of intent or purpose, except where not aimed at procuring any governmental or electoral action, result, or outcome.”<sup>138</sup>

The draft bill ensures that, when a SLAPP is filed, the target can move to ask the court to dismiss the case. The

case will be put on hold while the court determines whether it is an illegal SLAPP case.<sup>139</sup> The burden of proof is put on the SLAPP filer to demonstrate that the case is not a SLAPP, but a legitimate attempt to petition the court to address a grievance.<sup>140</sup> If the court agrees that the case was a SLAPP and dismisses the case, the SLAPP target will be awarded the costs of litigation and attorney fees. The court may also require the SLAPP filer to pay sanctions to deter future SLAPPs.<sup>141</sup> If a person is injured by the SLAPP, he or she may seek compensatory and punitive damages from the party that filed it.<sup>142</sup>

## Protecting public participation

While SLAPPs and other methods of intimidation have an impact on public participation in some UNECE countries and are likely to spread throughout the region, it is not a reason to stop participating. Information has to be spread widely about the use of these tactics so that courts will more easily recognise them as intimidation and harassment. Governments should also be encouraged to protect public participation by making it illegal to file SLAPPs in the first place.

The following list of conclusions and recommendations is based on the analysis and the cases received. This list cannot cover all issues in detail and does not purport to be applicable to all legal systems within the UNECE region. It will be up to individual states to determine those measures that are most applicable to their situations. However, the following items might give some indication of possible practical, legal and institutional steps that parties and other states may wish to take in line with the access to justice obligations under the Aarhus Convention. They are divided according to subject matter.

# Chapter 9

## Conclusions and Recommendations

Stephen Stec

### Legal/administrative issues

1. States should assess whether cases proceed in a timely fashion and should take measures to ensure their expeditious consideration. This may include reducing incentives for delay.
2. Tribunals should hold authorities to a standard in responding to claims by the public.
3. Tribunals should treat cases seriously where authorities do not give proper attention to complaints. More careful consideration of the complaints by the authorities is likely to be the result.
4. Tribunals should be able to dismiss cases brought by authorities where authorities have not shown a sufficient case (rather than returning the case time and again for further investigations).
5. Courts and other tribunals should be equipped with direct powers (backed up by officers with sufficient resources and authority) sufficient to enable them to administer justice effectively. This includes the possibility of imposing penalties on persons who do not obey orders to appear or who do not otherwise follow court instructions. Penalties should be established with a view to compel obedience to the tribunal.
6. States should take measures to improve the efficient enforcement of judgements of courts and other tribunals. The tribunals should have direct powers, as above, but prevailing parties in disputes should also have the assurance that the decision of the tribunal will be followed by the losing party. Incentives for following or ignoring decisions should be studied and measures should be taken to strengthen systems in those countries with poor records in this respect. The option of imposing personal liability on authorities or officers of private enterprises must be available where necessary (in extreme circumstances).
7. States should consider the benefits of allowing tribunals, under certain circumstances, to issue declaratory or explanatory rulings (advisory opinions), relevant to matters under consideration before other bodies. Where this is not allowed by law, or is not currently employed, states should consider making the necessary legal, administrative or other changes.
8. States should support further comparative work in the field of environmental impact assessment, ecological expertise, strategic environmental assessment, and other forms of biosphere reflection, with a view to assess whether the various practices in place provide an effective means for public participation in decision-making. This comparative work should study, inter alia, the relationship between the various forms and practices, and the necessity for recourse to justice. States should be open to the adoption of new laws and practices based on the exchange of views.
9. States should apply clearer standards in determining when a decision-making process has potential environmental impacts in order to avoid claims by the public.
10. States should enhance due process and other protections in administrative reconsideration and appeals processes in order to provide a meaningful opportunity for justice without the need for judicial appeal except in the most exceptional cases.
11. States should consider the establishment of tribunals with specially trained judicial or administrative judges with specific jurisdiction over environmental disputes.
12. States should exchange experiences on the general standards for due process and the effective administration of justice in their countries, covering matters such as timeliness, double jeopardy, res judicata and others.

13. States should adopt mechanisms and practices for the publication and/or dissemination of significant decisions by courts and other tribunals.
14. States should increase the use of alternative dispute resolution mechanisms in order to reach successful conclusions of disputes without the need for long and expensive proceedings. Such mechanisms include mediation, negotiation and arbitration.

## Standing issues

15. Articles 9(2) and 9(3) constitute a strong affirmation that NGOs, as well as individuals, have standing, subject to reasonable restrictions, but only if the overall scheme continues to promote “wide access to justice.” To make this clear, states should transpose this grant of standing into national law. If states decide to establish requirements for environmental NGOs that have standing under article 9(2) of the Convention, such requirements must be clear, consistent and fair. Standing requirements must not be designed to discourage the bringing of claims, but must be reasonably calculated to reach the intended result of ensuring that claims are brought by NGOs whose activities and purposes are genuinely focused on environmental protection. Any requirements that are imposed must be consistent with the duty to provide “wide access to justice.”
16. States should provide for means to aggregate small claims into a legally significant unit. Various mechanisms may be used for this (including class actions, representative standing and *actio popularis*), but the goal should be to eliminate the financial and other barriers to the use of legal means to address such claims.
17. In some systems, special judicial standing for parliamentary representatives may offer an alternative for claims where individuals may not have standing. This matter bears further study.

## Adequacy of remedies

18. To meet the obligation of providing adequate and effective remedies, including injunctive relief, states should evaluate the application of such remedies by courts and other tribunals. Specifically with respect to injunctions, states should ensure that the standards employed by a tribunal in determining whether to issue an injunction are clear, consistent and fair.
19. States should establish methodologies for calculating damages, even where these are difficult to quantify. In systems where experts may be employed to calculate damages, states should ensure that such experts

are independently certified and use objective and neutral criteria.

20. It may be necessary in some states to specify legal tests for causation and the calculation of damages through new legislation. This necessity should not be an obstacle to reform.

## Financial issues

21. Affordable legal services must be available to aggrieved members of the public in connection with environmental matters falling under the Aarhus Convention. Legal barriers to the establishment of non-profit legal advocacy organisations should be reduced or eliminated. Financial barriers to their operation should be reduced. Their contribution in addressing environmental issues in society should be recognised, including through appropriate legal and tax status. States should consider public funding of environmental advocacy organisations, and also of other related organisations, such as NGOs with scientific or technical environmental expertise.
22. Registration and tax rules for NGOs should be simplified. In general, they should be reduced to ministerial oversight to ensure that the activities of these organisations are legitimate according to their publicly declared purpose.
23. Bond requirements in injunction cases and other cases should be reduced. Rather than applying financial barriers to discourage the bringing of actions requiring injunctive relief, specific legal tests for injunctions might prove to be more effective and fair, without losing the benefits to society of enjoined illegal behaviour. There should be a re-examination of where the risks involved in applications for interim injunctions in environmental cases should fall. Where financial guarantees are required, consideration should be given to the establishment of a public interest fund to guarantee interim injunctions in the public interest.
24. As legal costs increase and opportunities for funding become scarce, legal systems should be adjusted to provide incentives for bringing successful cases in the enforcement of environmental laws. Mechanisms might include “one-way” shifting of fees and costs, taking into account the public interest.
25. Legal and administrative costs imposed by courts and other tribunals should be published according to a detailed schedule. Such costs should be easily understood and quantifiable at the outset of the proceedings.



## Systemic and capacity issues

26. States should dedicate substantial resources towards publicising successful environmental cases, in order to educate citizens about the effective use of environmental rights. States should also establish programmes of general education about the use of environmental rights.
27. States should embark on training programmes for judges, prosecutors, administrators and others who might be involved in environmental cases.
28. It is clear from the cases arising that further work is required in the area of improving public participation mechanisms. This will in turn reduce the number of disputes arising that require recourse to legal and administrative justice mechanisms further down the line.



# Preface, Explanatory note, Introduction and Part I: Endnotes

1 CEP/WG.5/2000/2, paragraphs 45-47.

2 See Report: *Complaint procedures and access to justice for citizens and NGOs in the field of the environment within the European Union*. Tilburg University, MinVROM Netherlands, April 2000, <europa.eu.int/comm/environment/impel/access\_to\_justice.pdf>.

3 See Umweltbundesamt (ed), Epiney, Astrid & Sollberger, Kaspar (authors), *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht*, p. 528 ff (cited by V. Rodenhoff).

4 The preamble to the Rio Declaration refers to “the integrity of the global environmental and developmental system.” Principle 4 states: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” See also principle 25: “Peace, development and environmental protection are interdependent and indivisible.”

5 As Fitzmaurice has said, “International environmental law is one of the most energetic fields of international law. It appears that its contribution to international law will continue.” See Fitzmaurice, Malgosia, The contribution of environmental law to the development of modern international law, in Makarczyk, Jerzy (ed), *Theory of international law at the threshold of the 21st century*. The Hague: Kluwer, 1996, pp. 909-25. See also Koskenniemi, 3 *Yb. Int. Env. L.*, 1992, pp. 125-28, stating that international environmental law has special characteristics, making traditional rules of state responsibility insufficient.

6 The importance of linking international and domestic environmental law has been explained by Ebbesson according to his theory on compatibility of international and national environmental law. See Ebbesson, Jonas, *Compatibility of international and national environmental law*. London/The Hague/Boston: Kluwer Law International, 1996.

7 See REC, *Doors to democracy: A pan-European assessment of current trends and practices in public participation in environmental matters*. Szentendre: The Regional Environmental Center for Central and Eastern Europe, June 1998, p. 26.

8 Council Directive 90/313/EEC on the freedom of access to information on the environment.

9 Article 4(2) of the Convention.

10 Time limits for public authorities to respond to a request vary widely from one Western European country to another. The shortest time limits are set in Denmark (as soon as possible within ten days), Portugal (ten days) and in the Netherlands (as soon as possible within two weeks). The longest time limit is applied in Germany, Spain (two months) and the United Kingdom (as soon as possible and at the latest two months). In some Western European countries, a special time limit is set for refusing access

to information, for example, in Denmark where this is set at ten days. In some countries (e.g. in Germany and Spain), access to environmental information is refused by not replying. In many Central European and EECCA countries, the same time limit applies both to responding to a request and providing the information requested. The time limit for the provision of information varies from 15 days in Hungary, Latvia, Lithuania and FYR Macedonia, to one month in several other countries. In a number of countries, the time limit may be reduced to 15 days if no additional investigation is required to respond to an information request (Armenia, Belarus, Moldova and Ukraine) or, if special inquiries are needed, extended by 15 days (Ukraine) or one month (Albania, Armenia, Belarus, Latvia, Lithuania, Poland, Moldova and FYR Macedonia). In Estonia, if the authorities are overloaded, the time limit may even be extended to three months. In some countries, shorter time limits are applied for refusing access to information (eight days in Hungary and Lithuania, ten days in Ukraine). For more detail, see Background paper ECE/CEP/46, Committee on Environmental Policy, fourth ministerial conference on the Environment for Europe, Aarhus, Denmark, June 23-25, 1998.

11 See European Commission, IP/99/489, Brussels, July 12, 1999.

12 See *Doors to democracy: A pan-European Assessment*, op. cit., table 2, pp. 24-25.

13 The Aarhus Convention deals with exemptions in article 4(3) and 4(4).

14 For more on the institution of ombudsman, see Part I, chapter 5 and appendix B.

15 See *Doors to democracy: A pan-European Assessment*, op. cit., p. 23.

16 Felix Frankfurter, a US supreme court justice, once wrote: “The history of liberty has largely been the history of the observance of procedural safeguards.” *McNabb v. United States*, 318 US 332, 1943.

17 *Strickland v. Morton*, 519 F.2d 467, 469, (9th Cir.) 1975.

18 However, they will in cases where legislation allows for the possibility to challenge the decision on procedural illegality. A few cases, like *Ukraine Case 2* (the Right to Know Case), have been decided in the region and are starting to change the tradition.

19 For an overview of EIA and ecological expertise, see Stec, Stephen, EIA and EE in CEE and CIS: Convergence or evolution?, in Nespor, S. (ed), *A world survey of environmental law* (special issue of *Rivista Giuridica dell'Ambiente*), Milan, 1996 (reprinted in *ELNI* 2/96).

20 REC, *Doors to democracy: Current trends in public participation in environmental decision-making in the Newly Independent States*. Szentendre: Regional Environmental Center for Central and Eastern Europe, June 1998, pp. 163-165.

21 Bruch, Carl E. & Czebiniak, Roman, Globalizing environmental governance, 32 *Envtl. L. Rep.* 10428, April 2002.

22 See *Implementation guide*, op. cit., at 131.

23 See CEP/WG.5/2001/5.

24 Article 9(3) differs from articles 9(1) and 9(2) in this regard. See Part I, chapters 4 and 5.

25 Article 3(1) of the Convention commits each party to take “necessary ... other measures” and not merely legislative and regulatory measures, as well as “proper enforcement measures.” The purpose of these measures, including the “other” and “enforcement” measures, is to “establish ... a clear ... and consistent framework” to implement the provisions of the Convention. Furthermore, article 3(4) requires each party to ensure that its national legal system is consistent with the obligation to provide “appropriate” support to groups promoting environmental protection. Taken together, these provisions could be applied by a court to allow direct enforcement, where constitutions allow the direct application of international law.

26 The liberal criteria are in part a result of judicial interpretations, but since the courts claim to be interpreting the legislation itself, the Netherlands may be listed in this section as having legislatively broadened standing.

27 See General Administrative Law Act of 1994, title 3.5, Extended Public Preparation Procedures. See also Betlem, Gerrit, Environmental locus standi in the Netherlands, 3 *Rev. of Eur. Comm. & Int’l Envir. L.* 238, 1994.

28 Klik, P. Group actions in civil lawsuits: The new law in the Netherlands, 4 *Eur. Env’tl. L. Rev.* 14, 1995, for analyses of articles 3:305a, 305b of the Dutch Civil Code.

29 Betlem, Gerrit, The state of Dutch environmental law anno 1995, in Nespor, Stefano (ed.) *A world survey of environmental law*. Milan: Rapporto Mondiale sul Diritto dell’Ambiente, 1996, pp. 259 & 263.

30 De Nieuwe Meer case, HR 27 June 1986, *Nederlandse Jurisprudentie*, 743, note by Heemskerck, cited in *ibid*.

31 Fuhr, Gebers, Ormond & Roller, Access to justice: Legal standing for environmental associations in the European Union, in Robinson & Dunkley (eds). *Public interest perspectives in environmental law*. London: Wiley Chancery, 1995, p. 89.

32 *Ibid.*, pp. 79-80.

33 *Ibid*.

34 *Ibid*.

35 In the opinion of this author, a requirement for an NGO to have a “personal direct interest” might be found to conflict with the requirement in article 3(4) of the Aarhus Convention that each party shall “ensure that its national legal system is consistent with [the] obligation” to provide “appropriate recognition of and support to associations, organizations or groups promoting environmental protection.”

36 The Council of State did suggest that if the threatened frog were an “endangered” species, an NGO might be able to sue for its protection.

37 La Loi du 12 janvier 1993 concernant un droit d’action en matière de protection de l’environnement. Erccmann, Sevigne, Enforcement of environmental law in United States and European law: Realities and expectations, 26 *Env’tl. L.* 1213, 1225 nn. 47-48, 1996. The information was taken from Betlem, Gerrit, Standing for ecosystems: Going Dutch, 54 *Cambridge L.J.* 153, 1995, pp. 160-70.

38 Case C-321/95, [1998] ECR I-1651.

39 See <europa.eu.int/eur-lex/en/treaties/dat/ec\_cons\_treaty\_en.pdf>.

40 Case C-321/95, [1998] ECR I-1651.

41 A brief, clear elaboration of this case can be found in *Report: Complaint procedures and access to justice for citizens and NGOs in the field of the environment within the European Union*, op. cit., pp. 37-40.

42 Sioutis, Glykeria, Greece environmental law and judicial review, in *A world survey of environmental law*, op. cit., p. 195.

43 *Ibid*.

44 *Ibid.*, p. 197.

45 In a similar vein, four judges of the Council of State reported at a colloquium in 1982 that a “legal interest” can be an “intangible” one. Jensen, Torben, General report, in *The concept of interest in administrative litigation (personal interest, collective interest, actio popularis), especially in environmental matters*, Eighth Colloquium of the Councils of State and Supreme Courts of Justice of Member States of the European Community, Copenhagen, 1982, p. 141 (referred to below as *The concept of interest*).

46 Afilalo, Ari, *How far Francovich? Effective judicial protection and associational standing to litigate diffuse interests in the European Union*, 1998 Jean Monnet Papers, Harvard Law School, <www.jeanmonnetprogram.org/papers/98/98-1-.html>. Other citations on German standing doctrine include Ormond, Environmental group actions in West Germany, in Fuhr & Roller (eds), *Participation and litigation rights of environmental associations in Europe: Current legal situation and practical experience*, 1991; Greve, The non-reformation of administrative law: Standing to sue and public interest litigation in West German environmental law, 22 *Cornell Int’l L. J.* 197, 1989; Koch, Class and public interest action in German law, *Civil Justice Quarterly*; Rose-Ackerman, Susan, American administrative law under siege: Is Germany a model? 107 *Harvard Law Review* 1279, 1994.

47 Greve, *ibid.*, p. 216.

48 Section 28 of the Administration Act (*Forvaltningsloven*) and section 54 of the (Civil) Procedure Act (*Tvistemalsloven*) require that a party has a “legal interest.” See also Bugge, Hans Christian, The new article on environmental protection in Norway’s Constitution, in *World Survey*, op. cit., p. 321, (“There are no special rules for environmental rights and interest.”).

49 Case report at NRt 1980, pp. 569 & 575, quoted in Basse, Ellen Margrethe, Report from Denmark, in *The concept of interest*, op. cit., p. 41.

50 *Ibid.*, pp. 575-76.

51 R. v. Inspectorate of Pollution, ex parte Greenpeace, Ltd. (No. 2) (1994) 4 All E R 329 (High Court, by Justice Otton).

52 Quoted in Darroch, Fiona, Recent developments in UK environmental law, in *A world survey of environmental law*, op. cit., pp. 293 & 300. Judge Otton said, however, that standing would be granted on a case-by-case basis, not that all interest groups would automatically be granted standing. This comes under the rubric of “leave to appeal,” something provided in the Supreme Court Act 1981 sec. 31(3); see *ibid*.

53 CO/3410/96 (High Court of Justice, QB Div., Crown Office) (April 20, 1997).

54 *Ibid*.

55 Article 162 of the 1991 *Constitution of the Republic of Slovenia*.

56 Party of Democratic Renewal of Domzale, and Kristina Brodnik from Domzale, No: U-I-34/92, 8.3.1993. On file with author.

57 This case study is presented in shortened form in the handbook. The author did additional research, in cooperation with Mirkovic, on this case and others.

58 Drustvo ekologov Slovenije (Association of Ecologists of Slovenia), Case No. U-I-30/95, 15.1.1996, as described by Milada Mirkovic in a memorandum on file with author.

59 Environmental Protection Act, article 4(3), *Official Gazette* of the Republic of Slovenia no. 32/93.

60 Gyula Bandi has stated: "The Constitution was amended in 1989 with the assumption that constitutional rights in the future would serve as the basis of legal action." His view is that an explicit expectation existed that citizens would be able to bring cases to the courts on the basis of Constitutional environmental rights. The Constitution regulated the right to environment in two relatively different ways. Article 18 grants a specific right: "The Hungarian Republic recognizes and enforces the right to a healthy environment for everyone." Article 70/D treats this right as a tool for ensuring the highest possible level of physical and mental health. In addition to protecting the man-made and natural environment, this right is ensured by the organisation of labour safety, public health and medical care systems. See Bandi, Gyula, *The right to environment in theory and practice: The Hungarian experience*, 8 *Connecticut Journal of International Law* 439, 1994. Actually, interpretation of the right to a safe environment may be unnecessary in Hungary. Unlike restrictions on access to constitutional courts in some other countries in the Central Europe and EECCA region, Hungary's Constitution imposes no such limitations. Any citizen can bring a case to this court. See *Constitution of the Republic of Hungary*, article 32/A; see also Act XXXII of 1989. Poland now has a similar provision. See *Constitution of Poland of 1997*.

61 Ibid.

62 Howard, A.E. Dick, Symposium: Constitutional "refolution" in the ex-communist world: The rule of law, September 26, 1996, 12 *American University Journal of International Law & Policy* 45, 1997. Bandi has also written that Chapter VII on citizen participation of the 1995 law gives these rights to NGOs.

63 The court did not base its decision on the specific words of article 70/D alone. "Rather, it drew parallels between the unity of Articles 18 and 70/D and the right to life on the basis that a healthy environment is an objective condition for the right to life." See Stec, Stephen, *Environment, democracy and wealth*, work in progress, on file with the author. If article 70/D merely clarifies and aids in the interpretation of article 18, as Stec argues, and article 18 alone can carry the weight of providing an enforceable, substantive right, this could be of great significance in other CEE countries whose constitutions also contain a broad environmental right comparable to that in article 18. Ibid.

64 <[www.curia.eu.int/en/pres/jeu.htm](http://www.curia.eu.int/en/pres/jeu.htm)>.

65 Ibid.

66 See *Implementation Guide*, op. cit., pp. 127-128.

67 See Background paper ECE/CEP/46, Committee on Environmental Policy, fourth ministerial conference on Environment for Europe, Aarhus, Denmark, June 23-25, 1998.

68 The Aarhus Convention is neutral in this respect. In its own terms, any right to judicial review accorded by article 9(2) "shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law."

69 In Spain Case 1 (the Nuclear Files Case), the Audiencia Nacional — a special division of the Supreme Court of Justice set up to relieve the pressure of business on the High Court and the High Court of Madrid Autonomous Region — acted as an administrative appeal body, and its decisions could be appealed to the Supreme Court of Justice.

70 For more examples, see *Complaint procedures and access to justice for citizens and NGOs in the field of the environment within the European Union*, op. cit.

71 Ibid.

72 The word ombudsman is Swedish and means "representative." For an historical overview of the institution of the ombudsman, see the International Ombudsman Institute's website at <[www.law.ualberta.ca/centres/oi/eng.htm](http://www.law.ualberta.ca/centres/oi/eng.htm)>.

73 For detailed information on the institution of the Ombudsman in Denmark see appendix B.

74 By 2001, the ombudsman office at the national level of government is found in approximately 110 countries around the world. In several countries, ombudsman offices exist at regional, provincial, national and municipal levels of government. Some countries have ombudsman offices at the national, regional and subnational levels, such as Australia, Argentina, Mexico and Spain, while other countries have ombudsman offices only at the subnational government level, such as Canada, India and Italy. In Austria, the institution of an ombudsman exists on federal and state level, and there are also special *Umweltanwaltschaften* (attorneys for the environment) at state level.

75 For more detail on the ombudsman in Western European countries, see *Complaint procedures and access to justice for citizens and NGOs in the field of the environment within the European Union*, op. cit.

76 For a general overview of the institution of the ombudsman in Central European and EECCA countries, see REC, *Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe*; and REC, *Doors to democracy: Current trends in public participation in environmental decision-making in Western Europe*, Szentendre: The Regional Environmental Center for Central and Eastern Europe, June 1998, pp. 49-50, 107, 184, 387-388.

77 See, Where does the ombudsman fit under the Convention?, *Implementation guide*, op. cit., p. 127.

78 The European ombudsman is appointed by the European Parliament and is an independent body, as explicitly stated in article 195 of the Treaty. For further information see <[www.euro-ombudsman.eu.int](http://www.euro-ombudsman.eu.int)>.

79 See also COM (2001) 161 Final communication from the Commission on widening consumer access to alternative dispute resolution, and Commission working document on the creation of a European extrajudicial network (EEJ-NET).

80 See <[www.pca-cpa.org/edr](http://www.pca-cpa.org/edr)>.

81 *Implementation guide*, op. cit.

82 Ibid.

83 See <[www.ajs.org/cji/](http://www.ajs.org/cji/)>.

84 Lambroschini, Sofie, *Russia: Judges, plaintiffs, defendants face arbitration court problems — Part 2*, <[www.rferl.org/nca/features/2001/04/25042001114033.asp](http://www.rferl.org/nca/features/2001/04/25042001114033.asp)>.

85 Ibid.

86 See <[conventions.coe.int/treaty/EN/WhatYouWant.asp?NT=174&CM=8&DF=>](http://conventions.coe.int/treaty/EN/WhatYouWant.asp?NT=174&CM=8&DF=>)>.

87 Baker, G. & Stigler, G., Law enforcement, malfeasance and compensation of employees, *Journal of Legal Studies* 3, 1974, pp. 1-18.

88 Buscaglia E., *Judicial corruption in developing countries: Its causes and economic consequences*, <[www.hoover.stanford.edu](http://www.hoover.stanford.edu)>.

89 See <[www.greco.coe.int](http://www.greco.coe.int)>.

90 De Castro, R. Adolfo, *The ombudsman and the myth of judicial independence*, <[www.ombuds.uci.edu/journals/1994/ombudsman\\_myth.html](http://www.ombuds.uci.edu/journals/1994/ombudsman_myth.html)>.

91 De Castro cites the Finnish ombudsman Soderman (currently the European ombudsman): "it is not a wise thing to allow the judicial system to be without any kind of control or supervision given the fact that the history of humanity ... evidences many examples of the unsatisfactory results produced by the exercise of unlimited power." Ibid.

92 To ensure effectiveness of such mechanisms, certain protection guarantees should be put into place where absent (so-called "whistle blower protection").

93 See Vari, Anna, *Civil society and public participation: Recent trends in Central and Eastern Europe*, <[www.sfu.ca/cedc/research/civilsoc/vari.htm](http://www.sfu.ca/cedc/research/civilsoc/vari.htm)>: "Due to the economic recession in the CEE region, the vast majority of communities have become interested in hosting operational facilities, despite the risk to the environment. Local governments are struggling with financial problems, so they are eager to have as much development on their territory as possible and the local public is more interested in keeping or creating jobs than in protecting the environment."

94 See <[conventions.coe.int/treaty/en/Treaties/Html/005.htm](http://conventions.coe.int/treaty/en/Treaties/Html/005.htm)>.

95 This section on advisory opinions was written by Brian Rohan, Ludmilla Ungureanu and Olena Dmytrenko.

96 Law on the Supreme Court of Justice of Moldova, article 2.

97 Law on the Judicial System of Ukraine, article 40, 1981.

98 Interview with Justice Vasyl Humenyuk of the Supreme Court of Ukraine, by Olena Dmytrenko.

99 For example, in Moldova, there is no deadline for forwarding the case between the instances of the court (P. Zamfir, presentation at the Sub-regional Case Study Development Meeting, Lviv, Ukraine, June 2001).

100 Sub-regional Case Study Meeting, Lviv, Ukraine, June 2001.

101 See, for instance, Moldova Case 1 (the Sarmi Park Case).

102 This section focuses on injunctions issued by courts. However, in some countries, injunctions may also be issued by other authorities. For example, in Denmark, an agency conducting an administrative review may grant a type of "administrative injunction." Administrative measures to halt an action are an important access to justice tool, since administrative review typically occurs earlier in the development of a project than a court action.

103 *Doors to democracy: Current trends in public participation in environmental decisionmaking in Western Europe*, op. cit., pp. 49-50, 107, 184, 387-388. Note also that terms differ from country to country.

104 Correspondence from Joost Rutterman to Brian Rohan, August 10, 2001.

105 In effect, the bond is a guarantee, *secured by actual funds*, and surrendered to the court's authority. These losses may include lost profits for an enterprise of which operations are suspended or delayed, as well as any fines or penalties the enterprise may incur from government, its suppliers or others.

106 Correspondence from Ludmilla Ungureanu to David Jacobstein, August 7, 2001.

107 Correspondence from Merab Barbakadze to Brian Rohan, August 9, 2001.

108 Oral communication by Sandor Fulop in Lviv, Ukraine, June 5, 2001.

109 *Doors to democracy: Current trends in public participation in environmental decisionmaking in Western Europe*, op. cit., p. 228.

110 McLaughlin & Dhillon, *Preliminary injunctive relief in the federal courts*, Practising Law Institute, 1996.

111 Conversation between Rutterman, Rohan and Jacobstein, August 13, 2001.

112 Code of Administrative Procedure of the Republic of Georgia, January 2000.

113 Kramer, Ludwig, *The citizen in the environment: Access to justice*, 8 *Environmental Liability* 127, 140, 2000.

114 Ukraine Case 4 (the Troublesome Cafeteria Case).

115 Ukraine Case 3 (the Pyrogovo Villagers Case).

116 *Doors to democracy: Current trends in public participation in environmental decisionmaking in Central and Eastern Europe*, op. cit., pp. 320-321.

117 Ibid., pp. 195 & 229.

118 Ibid., p. 370. Act on Court Fees, article 4(71), 1992.

119 Ibid., p. 147.

120 Ibid., pp. 119 & 229.

121 Ibid., p. 388.

122 The Sosnivka Case. See Kravchenko, S., *Victories and failures of public interest environmental law organizations in Eastern Europe*, in *Environmental citizen suits at thirtysomething: A celebration and summit*, Widener Symposium, Autumn 2003 (forthcoming). The case was described at an earlier stage in *Doors to democracy: Current trends in public participation in environmental decision-making in the Newly Independent States*, op. cit., pp. 35-36.

123 See CEP/WG.5/2001/5, paragraph 45.

124 Section 166 of the Code of Administrative Procedure (VwGO), § 166, sentence 1, no. 2 of the Code of Civil Procedure (ZPO).

125 Section 166 of the Code of Administrative Procedure (VwGO), § 114 of the Code of Civil Procedure (ZPO).

126 Ukraine Code of Civil Procedure, article 76.

127 Buckhannon Board and Care Home v. West Virginia Dept. of Health and Human Resources (no. 991848, May 29, 2001).

128 Department of statistics, tax police, state tax administration, a bank where an NGO wants to open an account (by law a juridical person must handle most financial transactions through the bank), the Ministry of Internal Affairs permit system (for obtaining a seal), social security fund, pension fund and unemployment fund.

129 See Tollefson, *Strategic lawsuits against public participation: Developing a Canadian response*, 73 *Canadian Bar Review* 200-233, June 1994 (discussing SLAPPs in Canada); Donson, F., *Legal intimidation*, Free Association Books, September 2000, (SLAPPs in Canada, the US and UK); Wells, *Exporting SLAPPs: International use of the US 'SLAPP' to suppress dissent and critical speech*, 12.2 *Temple Int'l & Comp. L.J.* 457, 1998 (SLAPPs in the UK, Canada and the US); and Pring, George & Canan, Penelope, *The world is getting SLAPP-happy*, *Nat'l. L.J.*, May 20, 1996, p. A19 (SLAPPs in the UK and US).

130 The term "SLAPP" was coined by University of Denver professors Pring and Canan. See, Pring, G. & Canan, P., *SLAPPs: Getting sued for speaking out*, 1996 (referred to below as Pring & Canan).

131 For examples of SLAPPs in UNECE countries, see the Friends of the Lubicon website <[www.foelubicon.ca/~foel](http://www.foelubicon.ca/~foel)> (Daishowa Paper Manufacturing Co. Ltd., a Japanese multinational, sued Friends of the Lubicon when it led a boycott against Daishowa for planned logging activities in areas claimed by the Lubicon) (Canada); *Protect Our Mountain Environment v. District Court*, 677 P. 2d 1361 (Colo. 1984) (US); see the McSpotlight website <[www.mcspotlight.org](http://www.mcspotlight.org)> for information about a libel case filed by McDonalds against citizens for distributing pamphlets criticising McDonalds (this has become known as the McLibel case) (UK); the McSpotlight website also reports that McDonalds has charged citizens in other UNECE countries with defamation, see <[www.mcspotlight.org/company/other\\_mclicels/index.html](http://www.mcspotlight.org/company/other_mclicels/index.html)> (Scotland, Poland, UK, US).

132 US Constitution, 1st Amendment. In *McDonald v. Smith*, 472 U.S. 479 (1985), the US Supreme Court traces the English roots of the petition clause.

133 Pring & Canan, op. cit., p. 168.

134 Ibid., p. 20.

**135** Ibid., p. 170.

**136** The Canadian province of British Columbia passed an anti-SLAPP law, the Protection of Public Participation Act (Bill 10) in early 2001. Unfortunately, a new government repealed the law in August 2001. Although there is currently no federal anti-SLAPP law in the US, approximately 16 states have anti-SLAPP laws. See the California Anti-SLAPP project at <[www.casp.net](http://www.casp.net)> for links to these state laws.

**137** This model bill (it is not law), the Citizen Participation in Government Act of 1995, can be found on the California Anti-SLAPP project's website at <[www.casp.net/halt.html](http://www.casp.net/halt.html)>.

**138** Ibid., section 4.

**139** Ibid., sections 6(a) & (b).

**140** Ibid., sections 6(c) & (e).

**141** Ibid., section 6(g).

**142** Ibid., section 6(h).





## Part II

# Related Access to Justice Issues



# Chapter 1

## Rights and duties towards a healthy environment

Stephen Stec

### The right to a healthy environment in Europe

In the 1998 publication, *Doors to Democracy*<sup>1</sup> — a survey of trends and practices in public participation in environmental decision-making in most of the UNECE region — a large number of countries were found to have a constitutional right to a healthy environment. Within Europe, the regional differences were remarkable. Four out of five jurisdictions surveyed in Eastern Europe, Caucasus and Central Asia, 12 out of 17 jurisdictions in Central and Eastern Europe, and a substantially lower proportion of countries in Western Europe had such a right (Western European constitutions tend to be significantly older).<sup>2</sup> Historical factors played a role. In countries directly affected by Chernobyl, for example, the formulations include specific rights of access to environmental information and to compensation for harm (e.g., Belarus, Ukraine, the Russian Federation and Moldova, mainly dating from 1991-92).

The content of such a right is by no means settled. A number of courts in many parts of the world have given interpretations of the meaning of a right to a healthy environment. Courts have affirmed the right to a healthy environment in the Philippines, Costa Rica, Argentina, Chile, Ecuador, Peru, India and Pakistan.<sup>3</sup> Fitzmaurice, for example, sketches three main schools of thought relating to the right to a healthy environment. These three main schools may roughly be characterised as follows:

- The right to a healthy environment is a fundamental human right upon which all other rights depend.
- The right to a healthy environment is not a fundamental right, but rather a right deriving from other human rights.
- No right to a healthy environment exists.

Moreover, proponents of a right to a healthy environment disagree on whether such a right is an individual right, a group right or a “third generation” right.<sup>4</sup>

There is a movement in Europe towards the recognition of the right to a healthy environment in one form or another. Jurisprudence in Belgium,<sup>5</sup> Slovenia, Hungary and Georgia and on the pan-European level through the European Court of Human Rights has begun to define environmental rights. Thus, the right to a healthy environment or the right to “home” in Europe begins to approach the various definitions of the right to a healthy environment as it is being shaped by jurisprudence in other parts of the world.

In at least one of the cases reported in this handbook, the connection was made between basic rights and environmental rights. In Georgia Case 2 (the Vake Park Case), the court appeared to be disposed towards accepting the arguments of the plaintiff that illegal activities affecting the natural heritage of the people were human rights violations under the Georgian Constitution. Unfortunately, the case was withdrawn due to threats to the plaintiff and his family before a final decision upholding the arguments could be made.

Another case from Georgia has raised an interesting aspect of rights and duties with respect to nature. Some legal systems treated nature as consisting of specific natural resources to be exploited. Nature protection often took the form of a kind of “sustainable use” of such resources in principle, whereas the reality was often of unrestricted exploitation. In Georgia Case 1 (the Defence of National Park Case) interpreting the Georgian Constitution, citizens resisted the dedication of certain territories as national parkland, claiming that the nature protection regime would prevent them from using the land, invoking the basic human right to use the natural environment, as well as the right to live in a healthy environment. While such a case could arise from a conflict between traditional practices and the value of undisturbed nature, in the Georgian case it appears to be based on a desire to preserve opportunities for *illegal* exploitation. This in turn raises the question of the difficulty to protect the environment when people have trouble meeting basic economic needs.

The decision of the Constitutional Court of Slovenia in the case of the National Association of Ecologists (see appendix B) may be based on a social or collective right to a healthy environment. Constructions of social or collective rights often emphasise the duties that correspond to the rights. In this case, the Constitutional Court of Slovenia interpreted the constitutional right for a healthy environment found in article 72 of the Constitution in order to determine whether the plaintiffs (NGOs and individuals) had a right to challenge the legality of a development plan for a small enterprise zone near an environmentally sensitive area. The standing of the NGO was recognised on the basis of the Environmental Protection Act, which imposed a *duty* to protect the environment upon professional and other NGOs established for the purpose of environmental protection. While this is in itself significant to the question of open standing for NGOs (see Part I, chapter 3), the more interesting question related to the individuals. In interpreting article 72, the court held that *all persons* have an interest in preventing damage to the environment, and that this interest is not limited to the area where they reside, but encompasses a broader area. The “interest” to prevent damage to the environment resembles a duty to protect the environment, and the court provided the necessary legal grounds for the discharge of the duty.

Jurisprudence pointing towards a so-called “third generation” right can be found in the Protected Forests Case (see appendix B) before the Constitutional Court of Hungary. This case, dealing with the constitutionality of an amendment of a 1992 law on the privatisation of agricultural land that had the effect of “reprivatising” land that had previously been declared protected, involved two constitutional provisions. The first of these constitutional provisions, article 18, was a rather conventional declaration of the right to a healthy environment. The second, article 70/D, provided for a human right to the highest possible level of physical and spiritual health. In a well-reasoned decision, the Hungarian Constitutional Court declared that these two constitutional rights, taken together, were “third generation” constitutional rights, that is, neither collective nor individual rights, but rights that nevertheless could be enforced. In drawing an analogy to the right to life on the basis that environmental resources are limited, most environmental damages are irreversible, and the environment is the basis for all life, the court interpreted articles 18 and 70/D to place an obligation on the state to provide legal and institutional guarantees for an objectively high level of environmental protection.<sup>6</sup> Thus, if at any time the state guaranteed a certain level of environmental protection, it could not be withdrawn arbitrarily. Such protections could only be diminished in proportion to upholding other constitutional rights or values. This furthermore implied, in the court’s view, that the rights found in the Constitution, in an appropriate case, could be the basis of a cause of action to require the state to maintain high objective standards of

environmental protection.<sup>7</sup>

An understanding of the right to a healthy environment — somewhere between a general collective or social right — and a duty to ensure an objectively high level of environmental protection, arises out of jurisprudence in Belgium. There, the tribunal of first instance of Antwerp considered a case where citizens brought an action to prevent the operation of a waste incinerator.<sup>8</sup> The judge sustained the action. In dismissing a third-party claim in the same case, the judge later drew out the relationship between his decision and the right to a healthy environment, stating:

“[I]f the government, in the implementation of its policy, comes into conflict, or threatens to come into conflict, with the fundamental rights of the citizens to a dignified existence in a healthy and safe environment, it must review this policy because the government should not seek legitimacy in itself, but in the promotion, safeguarding and protection of the interests of its citizens, whose health and safety it should give priority.”<sup>9</sup>

The judge was considering a decision that flew in the face of various expert reports and the findings of a committee led by a respected professor. Under such circumstances, the decision to permit the operation of the incinerator was held to be a violation of the right to a healthy and safe environment. Furthermore, the standing of citizens to bring the action in the place of the authorities who failed to act was discussed in terms of the right to a healthy environment. According to the judge, statutory developments in Belgium that granted standing to NGOs in environmental matters (see Part I, chapter 3) helped to shape the meaning of the right to a healthy environment by defining the terms of “action” by members of the public in defence of environmental issues. The New Municipal Act (article 271) gave a right to citizens to take up municipal matters where the authorities failed to act. These provisions together were held to grant standing to ordinary citizens to bring forward matters related to the environment where municipal authorities do not act.

In the *Lopez Ostra* case,<sup>10</sup> *Guerra v. Italy* (see appendix B) and *Hatton v. UK*, the European Court of Human Rights in Strasbourg began to define the “right to respect for private and family life, and for home” found in article 8<sup>11</sup> of the European Declaration on Human Rights<sup>12</sup> in a way that closely resembles a right to a healthy environment as it is being shaped elsewhere (see next chapter).

It can thus be seen that jurisprudence is a major factor in the shaping of the right to a healthy environment in the UNECE region, even though there is not yet a common understanding of this right. A “middle ground” is developing where, under certain circumstances, an individual may have a legally recognisable interest in a healthy environment.

## Aarhus rights and procedures contributing to the right to a healthy environment

The Aarhus Convention represents a “giant step forward”<sup>13</sup> in the quest to strengthen citizens’ environmental rights. The objective of the Aarhus Convention is found in its first article. Article 1 states:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

While referring to the right to a healthy environment, the Aarhus Convention deals primarily with the mostly procedural rights of access to information, access to decision-making and access to justice. Article 1 instructs parties in how to take steps to guarantee the basic right of present and future generations to live in an environment adequate to health and well-being. In so doing, it establishes the linkage between practical, easily understandable rights, such as those relating to information and decision-making, and the more complex collection of rights included in the right to a healthy environment.<sup>14</sup>

Article 1 also concretises the role of the state in helping to reach this goal. Under the framework of the Aarhus Convention, it is up to the party to provide the necessary administrative, legal and practical structures to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters. This represents a new approach to the role of the state. Instead of solving all of society’s problems itself, the state acts as a sort of referee in a process involving larger social forces, leading to a more organic and complete result. According to this view, once transparent and fair processes have been worked out, the main role of the state is to provide the necessary guarantees to maintain the framework. The Aarhus Convention provides a set of minimum standards to parties to guide them in how to protect the right to a healthy environment.

The main mechanism for guaranteeing the rights contained in the Convention is the access to justice pillar. By backing up the procedural and substantive rights concerning access to environmental information and public participation in environmental decision-making with legal, institutional and other guarantees, parties will provide the structure for discharging their responsibility to help people

to overcome the significant current challenges to achieve sustainable development.

Both the right to a healthy environment and the procedural rights in the Aarhus Convention are constantly evolving. It is important, therefore, to place the Convention in the context of the changing shape of the right to a healthy environment, as well as the developing international law on sustainable development.

Several reference points are found in the Convention’s preamble, including the Stockholm Declaration, the Rio Declaration, the World Charter for Nature, and others.<sup>15</sup> While the right to a healthy environment was recognised earlier in other regions of the globe, the Aarhus Convention appears to be the first hard-law text to recognise the rights of future generations. The International Court of Justice has used similar language in recognising that the very health of generations yet unborn is represented by the environment.<sup>16</sup> The Aarhus Convention takes this jurisprudential recognition a step further and moulds it into an international legal instrument. The three pillars that make up the fundamental structure of the Convention are essential to the achievement both of the right to a healthy environment, and also, no less important, of the possibility for individuals to fulfil their responsibilities towards others, including future generations.

Nowhere are these connections made more apparent than in actual cases. Perhaps the most well-known of such cases is the case of Nikitin (Russia Case 2), the Russian navy reservist acquitted of espionage charges after almost five years of proceedings. His alleged crime was providing information to the public about potential dangers to present and future generations resulting from activities of and accidents by the Russian nuclear submarine fleet. His acquittal was a vindication of civil and environmental rights, as well as the proper functioning of the Russian courts according to the rule of law. The case of *Guerra v. Italy* is an example where the lack of environmental information alone was connected to the very right of a family to choose how to live.

Basic human rights related to the environment and basic civic responsibilities are interwoven, but both the rights and the responsibilities may remain unfulfilled as long as persons lack the capacity to act in civil society. The role of the access to justice pillar is a critical one. It involves the establishment of proper institutions, the guarantee by the state of clear and transparent frameworks for action, and the judicious exercise of state power to ensure the proper functioning of the well-established mechanisms for empowerment towards sustainable development that are the subject of the Convention.



# Chapter 2

## Environmental human rights protection in the European Court of Human Rights

Andriy Andrushevych

The European Court of Human Rights serves as a supranational judicial body for the protection of human rights provided by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The Convention empowers the court to receive applications from any person, NGO or group of individuals claiming to be the victim of a violation by a state-party of the rights set forth in the Convention.

Although this represents a unique opportunity for individuals to seek protection of their rights, the jurisdiction of the court extends only to matters concerning the interpretation and application of the Convention and its protocols. Thus, access to the court is quite limited, especially with regard to environmental matters, as the text of the Convention does not contain an explicit reference to the environment.

Nevertheless, the case law of the European Court of Human Rights shows that it can grant standing and recognise a breach of human rights resulting from severe environmental pollution. The court has clearly admitted the existence of a link between the environment and human rights, although this was not proclaimed by the Convention itself.

Thus, while the access to justice provisions of the Aarhus Convention directly govern environmental matters, they are not covered by the European Convention on Human Rights. Either “procedural” rights provisions (such as article 6 of the European Convention on Human Rights — right to a fair trial) must be used, which give access to the court regardless of the substantial matter of the suit, or specific rights must be interpreted so that environmental concerns are taken into account (such as article 8 — right to respect for private and family life, article 10 — freedom of expression, and article 2 — right to life).

The European Court of Human Rights has developed the position that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their

private and family life adversely without, however, seriously endangering their health”.<sup>17</sup>

The first environmental case resolved in favour of petitioners was *Zander v. Sweden* (1993). The applicants’ land was adjacent to a waste-tip. Analyses made in 1979 revealed that the waste had polluted the applicants’ drinking water as a result of which a ban was placed on the use of the water, and municipal drinking water was temporarily supplied instead. Subsequently, the permissible concentration of the relevant pollutant in the drinking water was raised and the applicants’ supply of municipal drinking water was stopped. A company’s application to the licensing authority for a permit to dump waste on the tip was granted and requests by the applicants that such a permit must be conditional upon the company taking precautionary measures to avoid further pollution were rejected, apart from an obligation to provide the applicants with safe drinking water should the concentration levels of pollutants in their own water exceed permitted limits. The applicants’ only right of appeal against the licensing authority’s decision was the government, which dismissed the appeal. The applicants complained that they had been denied a hearing before a tribunal in the determination of their civil rights, in violation of article 6(1) of the Convention. The Court held unanimously that there was a breach of article 6(1)<sup>18</sup> and awarded non-pecuniary damages of SKR 30,000 to each applicant, as well as SKR 145,860 toward their court expenses.

Article 6(1) is an important remedy that may be used if the access to justice provisions of the Aarhus Convention are not guaranteed by national law. However, a few issues must be highlighted with regard to such claims. In considering complaints based on the violation of article 6(1), the Court must ascertain whether there was a dispute over a right recognized under domestic law. The dispute can also be genuine and serious: it must relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Finally, the result of the proceedings must be directly decisive for the right in question.<sup>19</sup>



*Lopez Ostra v. Spain* (1994) is probably the most well-known and cited case of the European Court of Human Rights where environmental pollution was recognised to result in the violation of a human right. A waste treatment plant was built close to the applicant's home in a town with a heavy concentration of leather industries. The plant began to operate without a license, releasing fumes and odours that caused health problems among local residents. The applicant alleged breaches of articles 8 and 3 of the Convention, and claimed compensation for damage and reimbursement of costs and expenses under article 50. The court held that there was a breach of article 8 (right to respect for private and family life) and awarded damages, as well as expenses and costs.

Two aspects of this case are relevant from the access to justice point of view:

- the exhaustion of national remedies (which is the requirement to file a complaint with the European Court of Human Rights under article 35(1) of the Convention); and
- the submission of statements and medical reports (forming grounds for the complaint) not to the national Spanish courts, but instead directly to the European Court of Human Rights.

The first aspect concerns one of the most common obstacles to access to justice: duration of the administrative and judicial proceedings. The court held that "it was not necessary for the applicant to institute ordinary criminal and administrative proceedings since the special application for protection of fundamental rights lodged with the Audiencia Territorial was an effective, rapid means of obtaining redress in the case of her complaints relating to her right to respect for her home and for her physical integrity, especially since that application could have had the outcome she desired, namely closure of the waste treatment plant."

The second important aspect is that, if the administrative or judicial review process lasts long, new facts and evidence can appear while the complaint is being considered by national courts or by the European Court of Human Rights. In *Lopez Ostra v. Spain*, the court considered government objections in this regard unfounded and

said that "where a situation under consideration is a persisting one, the Court may take into account facts occurring after the application has been lodged and even after the decision on admissibility has been adopted."

Following *Lopez Ostra*, other environmental cases soon appeared, such as *Guerra v. Italy* (see appendix B), where the court held that the petitioner's right under article 8 of the Convention had been infringed even though there was no showing of potential physical harm. Rather, the authorities had failed to provide necessary environmental information to the applicants so that they could be properly informed about environmental risks from a chemical factory. This case is also interesting because the court left open the consideration of a claim under article 2 of the Convention (right to life). The court stated that, "although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life."

A 2001 decision by the court, *Hatton and others v. United Kingdom* (application no. 36022/97), goes further than *Lopez Ostra* and *Guerra* to apply article 8 to the quality of the inquiry that a government must undertake in decision-making that affects "private and family life".<sup>20</sup> Applicants living near London Heathrow airport claimed that a 1993 scheme instituted by the airport significantly increased the noise levels to which they were subjected during the night, causing ill health in violation of their rights. The case turned on the UK government's argument that, in instituting the 1993 scheme, a balance had been struck between private interests and economic interests, according to article 8(2) of the Convention.

The court focused on the government's limited research into the nature of sleep disturbance before the scheme was put in place, as well as on the poor quality of government research into the economic benefits of night flights. The court found that the government had failed to generate adequate information and to undertake the research necessary to justify its contentions. Given this, the government was found to have "failed to strike a fair balance" between the applicants' rights and a state economic interest in the implementation of the 1993 scheme.

# Chapter 3

## Access to justice at the international level: Citizen enforcement under the North American Agreement on Environmental Cooperation

Andriy Andruskevych

In 1993, Canada, Mexico and the US signed the North American Agreement on Environmental Cooperation (NAAEC) — also called the NAFTA Side Agreement. The agreement established a unique procedure for citizen complaints to a supranational body about non-enforcement by a party of its environmental law. While not without its critics, it is probably the only quasi-judicial forum on international level designed especially for consideration of environmental complaints, and it represents an important achievement of contemporary international environmental law in the sphere of access to justice.

As provided by article 1 of the NAAEC, the objectives of are to:

- foster the protection and improvement of the environment in the territories of the parties for the well-being of present and future generations;
- promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- increase cooperation between the parties in improving the conservation, protection and enhancement of the environment, including wild flora and fauna;
- support the environmental goals of NAFTA;
- avoid creating trade distortions or new trade barriers;
- strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- enhance compliance with and enforcement of environmental laws and regulations;
- promote transparency and public participation in the development of environmental laws, regulations and policies;

- promote economically efficient and effective environmental measures; and
- promote pollution prevention policies and practices.

The agreement provides for a special institutional mechanism designed to facilitate and oversee its implementation by the parties — the Commission for Environmental Cooperation (CEC). The procedure of citizen submissions on enforcement matters is covered by articles 14 and 15 of the agreement. Together with the Citizen Submission Guidelines, these articles provide the legal basis for the submission and consideration of citizens' complaints.

In general, the procedure is as follows. Any NGO or person can lodge a submission to the secretariat, asserting that a party is failing to enforce its environmental law effectively. If such a submission meets certain admission requirements, the secretariat determines whether the submission merits requesting a response from the party concerned (the country against which the submission was filed). After the response from the party, the secretariat can inform the council that developing a factual record is warranted. If the council so instructs, the secretariat prepares such a factual record, which can then be made publicly available by another decision of the council.

One criticism against this procedure is that “environmental law” is narrowly defined. Another criticism is that a party may not be held to have failed to enforce its environmental law where the action or inaction in question by agencies or officials of that party:

- (a) reflects a reasonable exercise of their discretion in respect of investigative, prosecutorial, regulatory or compliance matters; or
- (b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.

Valid submissions may not extend to legislative steps, e.g. adopting new regulations, even if adoption of the new legislation suspends the implementation of the old legislation.<sup>21</sup>

For a submission to be considered it must meet certain technical requirements. Once the submission has successfully passed this stage, the Secretariat determines whether it warrants a response from the concerned Party. In deciding whether to request a response, the Secretariat shall consider whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions raises matters whose further study in this process would advance the goals of the Agreement;
- (c) private remedies available under the party's law have been pursued; and
- (d) the submission is drawn exclusively from reports in the mass media.

With respect to point (a), the guidelines provide that, in considering whether the submission alleges harm to the person or organisation making the submission, the secretariat will consider, among other factors, whether the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in article 45(2) of the agreement.

This definition of harm is broad enough to allow for submissions concerning the protection of the environment and natural resources without proof of individual harm. This was the approach of the secretariat in the Cruise Ship Pier Project submission.<sup>22</sup>

With respect to point (c), the guidelines do not require exhaustion of national remedies. In some cases a mere attempt (or reasonable efforts) to use private remedies was enough to meet this requirement.<sup>23</sup>

If the secretariat decides that the submission merits a response from the party, it informs the party about the submission by sending a copy to the party, together with any additional information.

The response from the party shall be sent within 30

days (in exceptional circumstances, 60). The consideration process can be terminated if the party advises the secretariat that the matter is the subject of a pending judicial or administrative proceeding. The guidelines define this as follows:

- (a) a domestic judicial, quasi-judicial or administrative action pursued by the party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
- (b) an international dispute resolution proceeding to which the party is part.

According to secretariat case-law, only proceedings that are designed to culminate in a specific decision, ruling, or agreement within a definable period of time may be considered as falling within this provision. Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, are not sufficient to trigger the automatic termination clause.<sup>24</sup> Moreover, the party must provide evidence that the proceedings are ongoing and meet the requirements.

In addition, the guidelines provide that the party may include in its response whether environmental policies have been defined or actions taken in connection with the matter in question.

Following this stage, the council may instruct the secretariat to compile a factual record. The votes of two of the three council members are required for such a decision. That is at least one of the factors that has led to a very small number of decisions on the preparation of factual records. By the end of November 2001, only eight out of 31 submissions resulted in a council instruction to the secretariat to prepare factual records.<sup>25</sup> The final factual record may be made public by the two-thirds vote of the council. This is the end of the process. As such, it has a similar force to decisions of an ombudsman. By the end of January 2002, two factual records had been completed by the secretariat, approved by the council, and made public.

## Part II: Endnotes

1 *Doors to democracy*, four volumes, op. cit.

2 See also E/CN.4/Sub.2/1994/9, annex I.

3 See Cameron, James & Abouchar, Juli, The status of the precautionary principle in international law, in Freestone and Hey, *The precautionary principle and international law: The challenge of implementation*, The Hague: Kluwer, 1996, p 48, nn. 62-69.

4 See Fitzmaurice, op cit., pp. 910-11 and accompanying footnotes. Also Mahoney, K.E. & Mahoney, P. (eds), *Human rights in the 21st century*, Dordrecht, 1993. See especially the articles by Trinidad and Handl.

5 See President of the Tribunal of First Instance of Antwerp, April 20, 1999, unreported.

6 See also Shemshuchenko, Y., Human rights in the field of environmental protection in the draft of the new Constitution of the Ukraine, in Deimann, S. & Dyssli, B. (eds), *Environmental rights: Law, litigation and access to justice*, London: Cameron May, 1996, pp. 33-40. The author states on p. 35: "the human right to a healthy environment is actually the right of an individual to demand the maintaining of ecological standards, set up by law."

7 In the subject case, the fact that no provision had been made in the amendments to offer such a level of protection once the forests were to have passed into private hands was evidence that the state had failed in its basic responsibility to ensure an objectively high level of environmental protection. Thus, the court invalidated the amendments.

8 Pres. Trib. Anvers, 2 février 1999, en cause de: S.G., P.M. et co. c/ I.S.C.R.L., Kluwer Editions Juridique Belgique, Amenagement-Environnement, 1999/3, 228, overruled on other grounds.

9 President of the Tribunal of First Instance of Antwerp, April 20, 1999, unreported.

10 20 E.H.R.R. 277, 1995.

11 Nov. 4, 1950, 213 U.N.T.S. 222, as amended. Ibid., p. 230. Article 8, entitled Right to respect for private and family life, states: (1) Everyone has the right to respect for his private and family life, his home and his correspondence; and (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

12 The European Declaration on Human Rights is now applicable in most of the countries in the UNECE region.

13 In the words of Kofi A. Annan, Secretary-General of the UN. See Foreword, *Implementation guide*, op. cit.

14 Thus, it addresses one of the shortcomings in the establishment of the right to a healthy environment — that is, the lack of effective implementation. See E/CN.4/Sub.2/1994/9.

15 The background of the Aarhus Convention and in particular the links made by its preamble are treated in greater detail in *Implementation guide*, op. cit., especially pp. 12-13, 16-17.

16 Opinion of the ICJ, *Legality of the threat or use of nuclear weapons*, 1996, pp. 241-242.

17 Lopez Ostra v. Spain (1995) 20 E.H.R.R. 277, paragraph 51.

18 Article 6(1) of the Convention states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

19 E.g., see Skarby v. Sweden (A/180-B): (1990) 13 E.H.R.R. 90, paragraph 27.

20 As the case is still pending in the Grand Chamber, the judgement has not yet become effective and will do so only upon final judgement by the Grand Chamber of the ECHR. See Teßner, Dirk, Night flights at London Heathrow violate human rights, 1 *ELNI Review* 29, 2002, for a detailed handling of the case.

21 See the Spotted Owl submission by Earthlaw, Submission A14/SEM/ 95-001/06/14(2).

22 See Recommendation of the secretariat to council for the development of a factual record in accordance with articles 14 and 15, SEM-96-001, June 7, 1996.

23 Ibid.

24 SEM-97-001/B.C. Hydro recommendation of the secretariat to the council, April 27, 1998.

25 See Stanton Kibel, Paul, Awkward evolution: Citizens enforcement at the North American Environmental Commission, 32 *Envtl. L. Rep.* 10769, 2002.



## Part III

# Case Studies





# Case study methodology

The cases that follow were generated during the development of the handbook. These case studies were submitted by national focal points for the Aarhus Convention in response to a request from the government of Estonia (the Access to Justice Task Force lead country), and by independent, non-governmental lawyers and NGOs in response to announcements made by the project team.

The announcements soliciting case studies requested that case studies be submitted in a standard format. Case study authors were encouraged to provide commentary, and were required to take into account the views of all parties and stakeholders involved. A standard letter was provided for this purpose.

In addition, most of the case studies were submitted to comments by members of the Project Steering Committee and were further developed according to a predetermined template. Virtually all case studies provided by countries have been included in the handbook. Of those provided by NGOs and lawyers, the selection criteria included relevance to the Aarhus Convention, geographical scope and the range of subjects covered. The goal was to have cases from as many countries and on as large a range of subjects as possible. A number of the cases from Central Europe and the EECCA region were generated during a Sub-Regional Case Study Development Meeting held in Lviv, Ukraine, June 4-5, 2001.

Case studies were collected until July 2002 and were current at this time.

The analysis of each case study was written by the respective authors and submitters. Every effort was made to clarify the issues found in each case, through dialogue with the authors and revision of the studies, and the cases were edited to ensure consistency. In addition, the cases submitted by non-governmental lawyers and NGOs were transmitted to the Aarhus Convention focal points in the subject countries for commenting. Nevertheless, it is virtually impossible to verify all aspects of cases coming from a variety of sources in such a wide and diverse geographical region. Thus, the editor and the states and organisations involved in the publication of the handbook cannot assume responsibility for the content or for any views expressed in the cases.

Appendix B, entitled, "Other cases and background materials," consists of significant cases and relevant material that have been identified in the course of research in the development of the analytical part of the handbook, but which for one reason or another could not be fully developed according to the methodology above. These cases are generally presented in original form, often abridged, but unedited. In some instances, summaries of the cases have been written especially for the handbook.



## Table of cases

Cases			
COUNTRY AND NUMBER	CASE NAME	AARHUS CONVENTION PROVISION	KEYWORD
<b>Armenia</b>			
Case 1	Victory Park Case	Article 9(2), Article 9(3) Article 9(4)	Right to public participation, remedies
<b>Austria</b>			
Case 1	Enns River Road Case	Article 9(2)	Legal standing
<b>Belgium</b>			
Case 1	Representative Standing Case	Article 9(2)	Legal standing
Case 2	Special Procedure Case	Article 9(2)	Legal standing
Case 3	Organisational Mission Standing Case	Article 9(2) Article 9(3)	Legal standing
<b>Bulgaria</b>			
Case 1	Pirin Mountain Case	Article 9(2)(b)	Improper procedure for public participation
Case 2	Elshitza Case	Article 9(3) Article 9(4)	Improper procedure for public participation/injunctive relief

## Cases

COUNTRY AND NUMBER	CASE NAME	AARHUS CONVENTION PROVISION	KEYWORD
<b>Czech Republic</b>			
Case 1	Sumava National Park Case	Article 6(4), Article 9(2) Article 9(3), Article 6(3)	Legal standing
Case 2	Gravel Mining Case	Article 9(2)	Legal standing
Case 3	Bohemian Highway Case	Article 9(2), Article 9(3) Article 6(4)	Lack of judicial review
<b>Georgia</b>			
Case 1	Defence of National Park Case	Article 9(2) Article 9(5)	Sufficient interest/financial and other barriers
Case 2	Vake Park Case	Article 9(1), Article 9(2) Article 9(3), Article 9(5)	Legal standing/financial and other barriers
<b>Germany</b>			
Case 1	Waste Fuel Plant Case	Article 9(4)	Legal standing/injunctive relief
Case 2	Experts' Documents Case	Article 9(1) Article 9(2)	Improper procedure for public participation
Case 3	Windmill Case	Article 9(2)	Legal standing
Case 4	Nature Reserve Case	Article 9(2), Article 9(3) Article 9(4)	Legal standing/injunctive relief
Case 5	Baltic Sea Motorway Case	Article 9(2), Article 9(3) Article 9(4)	Legal standing/injunctive relief
Case 6	Elbe Case	Article 9(2) Article 9(3)	Legal standing/injunctive relief
<b>Hungary</b>			
Case 1	Balaton Highway Case	Article 9(2), Article 9(4)	Legal standing
Case 2	Metal Plant Case	Article 9(1)	Access to information
<b>Kazakhstan</b>			
Case 1	Petrol Plant Case	Article 9(4)	Improper procedure for public participation
Case 2	Waste in the Caspian Case	Article 9(3) Article 9(4)	Legal standing/enforcement of law
Case 3	Excessive Fees Case	Article 9(4)	SLAPPs/barriers to effective public participation
<b>Lithuania</b>			
Case 1	Extra-Judicial Proceeding Case	Article 9(3), Article 9(4)	Extra judicial procedure

Cases			
COUNTRY AND NUMBER	CASE NAME	AARHUS CONVENTION PROVISION	KEYWORD
<b>Moldova</b>			
Case 1	Sarmi Park Case	Article 9(1), Article 9(2) Article 9(3), Article 9(4)	Access to information/public participation/injunctive relief
<b>Netherlands</b>			
Case 1	Oily Bird Case	Article 9(2), Article 9(3)	Legal standing
Case 2	“Indispensable” Pesticides Case	Article 9(3), Article 9(4)	Legal standing/injunctive relief/ financial and other barriers
<b>Poland</b>			
Case 1	Highway and Housing Case	Article 9(2), Article 9(3) Article 9(4)	Improper public participation procedure
<b>Russia</b>			
Case 1	Water Works: A Case in Progress	Article 9(2), Article 9(3) Article 9(4)	Improper public participation procedure/remedies
Case 2	Nikitin Case	Article 2(3), Article 3(8) Article 9(4)	Access to information/fair, equitable and timely procedure
Case 3	Shrinking Park Case	Article 9(2)(b), Article 9(3) Article 9(4)	Legal standing/injunctive relief/ access to information
<b>Serbia and Montenegro</b>			
Case 1	Silver Plate Case	Article 9(3), Article 9(4)	Enforcement of administrative decisions
Case 2	Zvesda Cafe Case	Article 9(3), Article 9(4)	Enforcement of administrative decisions
Case 3	Cacak Case	Article 9(2)	Improper procedure for public participation
<b>Spain</b>			
Case 1	Nuclear Files Case	Article 9(1), Article 9(4) Article 9(5)	Financial, time and other barriers
Case 2	Aznalcollar Waste Dam Case	Article 9(3), Article 9(4) Article 9(5)	Financial and other barriers

## Cases

COUNTRY AND NUMBER	CASE NAME	AARHUS CONVENTION PROVISION	KEYWORD
<b>Ukraine</b>			
Case 1	Ukrainian Right to Know Case	Article 9(1) Article 9(4)	Access to information
Case 2	NGO Right to Information Case	Article 9(1) Article 9(4)	Access to information
Case 3	Pyrogovo Villagers Case	Article 9(3)	Legal standing/remedies
Case 4	Troublesome Cafe Case	Article 6, Article 9(2) Article 9(4)	Improper procedure for public participation/remedies
Case 5	Access to Information Case	Article 2, Article 4 Article 9(1)	Access to information
<b>United Kingdom</b>			
Case 1	Lappel Bank Case	Article 9(4)	Legal standing/injunctive relief
Case 2	Agricultural Storage Centre Case	Article 9(4) Article 9(5)	Financial barriers
<b>United States</b>			
Case 1	Telephone Case	Article 9(2) Article 9(4)	Insufficient information for effective public participation

# Armenia Case 1

## The Victory Park Case

Residents seeking to stop ongoing construction of a large development in order to secure their rights to participate in decision-making on the project, faced considerable obstacles in attempting to use the courts.

### Relevant Aarhus provisions

- Articles 9(2), (3) and (4)

### Key issues

- Standing
- Injunctive relief
- Unbiased and objective approach of judges

### Case study details

**Cited case name:** The Proposed Development of Hotel in Victory Memorial Park, Yerevan City, Armenia

### Parties involved

**Plaintiffs:** Two citizens, residing near Victory Park, Yerevan City

**Plaintiffs' representation:** Environmental Public Advocacy Center, Armenia

**Defendants:** General architect, Golden Palace Hotel Complex; Republic of Armenia, Prime Minister

### Background facts

In the city of Yerevan, Armenia, Victory Park is a revered place of natural beauty and civic pride. Established in 1945, the multi-acre park serves as a memorial to World War II veterans and a home to numerous species of plants

and wildlife. On this long designated protected area, all development and construction are prohibited except for those projects approved for “functional” purposes.

In 2000, Yerevan Municipality authorities approved a preliminary proposal for the construction of the Golden Palace, a large hotel complex situated on park grounds. On October 9, 2000, however, the mayor of Yerevan issued a resolution stating that a construction permit would not be granted until an environmental impact assessment (EIA) of the project had been performed, reviewed and approved by officials.

Under Armenian law, any proposed development equal to or more than 1,000 square metres must have an EIA. In this, the proposed project qualifies. In addition, EIA regulations require that the assessment entail a three-stage public hearing in which interested parties can evaluate the EIA and advise the ultimate decision-making.

Despite this, on October 11, 2000, only two days after the mayor's order, the general architect overseeing the project ordered the beginning of construction. In response, the General Prosecutor's Office warned the architect that commencing construction was illegal. Nevertheless, construction continued.

Residents located near Victory Park filed a lawsuit against the architect.

### Procedural history

Enlisting the legal representation of the Environmental Public Advocacy Center (EPAC), the residents filed a complaint before the court of first instance, asserting that the architect proceeded with construction in violation of EIA regulations. In doing so, the architect had denied the residents the opportunity to participate in proceedings regarding the hotel development and its impact on the environment and community. Further, in order to preserve available remedies throughout the proceedings residents requested an injunction to halt further construction.<sup>1</sup> The court denied the residents' request for an injunction.



After more than two months, the hearing of the case began. The architect, however, did not attend, sending instead a certificate asserting that the commencement of construction was valid. In short order, the court dismissed the lawsuit without addressing the merits of the claim.

### Final outcome

Construction onsite continues. An EIA and attendant public hearing have not been performed.

### Related actions and campaigns

Using the Internet and the Caucasus Environmental NGO Network (CENN), information has been disseminated about the illegal construction and its potential consequences.

### Access to justice techniques

Plaintiffs attempted to stop construction and ensure EIA proceedings by filing a lawsuit and requesting injunctive relief. In preparation of the lawsuit, EPAC organised strategy meetings with other NGOs, mass media, architects and representatives of the General Prosecutor's Office. Based on the meetings, EPAC sent interrogatories (official questions) to the mayor, the prime minister and the general prosecutor regarding the facts of the case and alleged violations of law. For example, EPAC requested that the mayor provide information on the following:

- the Mayor's resolution on hotel construction;
- whether an EIA had been carried out;
- the conclusion of the EIA (if one had been carried out); and
- whether public meetings were held concerning the project, as required by EIA rules.

Based on this information, EPAC then assembled its case.

### Case study analysis

Like many nations, Armenia has several laws on the books that grant citizens access to justice in the form of NGO standing, public hearings and judicial review. As this case study illustrates, however, printed laws need to be

enforced in practice by government officials and the courts.

In the instant matter, EIA rules state precisely that projects such as the one at issue require an EIA and that the public has a right to participate in the proceeding. Yet the court balked at issuing an injunction that would preserve that right by halting construction. It is common for the court not to issue injunctions in environmental matters, given its lack of familiarity with environmental laws. However, it is in these matters where they are most often required. If injunctions are to become a viable "access to justice" tool, then courts must rise to the challenge and see their value.

Aiding in this process would be the reforming of another matter arguably present in this case — the non-independence of the judiciary. Particularly in environmental cases, where judicial review of government actions is common, the judiciary must see itself not as an arm of the government authority but rather as a neutral conduit through which citizens and the government can resolve differences. The most common example of this problem is in the area of public participation. Similar to injunctions, procedural rights to participate and be informed are essential "access to justice" tools. In the instant case, the court did not go far enough to preserve this right. Instead, it sacrificed the public's participatory rights in the interest of "efficiency" and appeasing well-heeled interests.

If access to justice laws are to have any significance, the courts of Armenia and elsewhere must do more to bring them into the light of the courtroom.

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# Austria Case 1

## Enns River Road Case

Plans to construct a road along the Enns River would cut through areas that are under the protection of the Natura 2000 regime. Various stakeholders used different access to justice means to contest the plans.

### Relevant Aarhus provision

- Article 9(2)

### Key issues

- Standing
- Public participation during the preparation of executive regulations and/or generally legally binding normative instruments
- Access to administrative and judicial review procedures

### Case study details

**Cited case name:** Planned construction of new road along riverside of Enns River

### Parties involved

**Plaintiffs:** Local communities, several people from the region and their groups, citizens' group "NETT"

**Defendants:** Government of the province of Styria

**Third-party intervenors:** WWF Austria, Vogelwarte association for bird protection

A special investigation procedure was initiated by the European Commission against the Government of Austria, based on complaints submitted by WWF Austria and other interest groups.

### Background facts

The construction of a road along the Enns River was under discussion for 25 years. At first a motorway was proposed, and then it was downsized to a regular Federal road (Bundesstrasse). The old road led through cities and villages of the region. The new road was planned to be located far away from where people live, close to the waterside, cutting through a protected area with endangered species of birds.

Since Austria became a member state of the European Union, huge parts of the location came under the protection of the Natura 2000 regime.

The opinions of people from the region were divided over the project, and it became a complicated issue both politically and legally. The final decision had not been taken as of late 2001, but it appeared likely that the road would never be constructed.

### Procedural history

For the construction of the road, according to Austrian legislation, several legal acts and administrative decisions were necessary:

- 1) a ministerial decree (*Verordnung*) defining the exact location of the road (similar to the building permit);
- 2) a local government decision (permit) according to the nature protection law of the province of Styria;
- 3) an "exceptional" decision legalising the road construction in the protected area (contrarius actus to the act granting protection status);
- 4) a water consent/permit, as the road was planned very close to the riverside and several dwellings of land owners could have been affected; and
- 5) an expropriation of the farmers and other affected land owners not willing to sell the land required for the project, and the ecological compensation measures.

With regard to (1), groups opposing the construction of the road brought a lawsuit to the Constitutional Court of Austria, but did not succeed. The decree was still in force.

The law on federal roads was very restrictive when it came to legal standing issues: No legal standing for neighbours, citizen groups or NGOs. The reason citizens addressed the Constitutional Court of Austria and not the Administrative Court was that the Administrative Court was only competent for complaints against individual decisions of administrative authorities, not against ministerial decrees.

In terms of (2), the decision, according to the applicable law, could only be issued for a limited period of time and had expired. There was no valid permit according to the nature protection law at the moment. Taking into account the developments of the last years (Natura 2000, LIFE project) a positive decision appeared to be most unlikely in late 2001. The nature protection law of the province of Styria granted no legal standing for neighbours, citizens of the region or NGOs, so these groups could only act through contacts to politicians and other forms of lobbying.

Regarding (3), the contrarius actus was to be set by the local government of Styria. The “Ombudsman for nature” (*Umweltanwalt*) of the province of Styria had legal standing in the procedure and brought a lawsuit to the Administrative Court, but the remedy was unsuccessful. NGOs and citizen groups had no legal standing in the procedure.

In point (4), the authority responsible for the road construction first claimed that a water consent would not be necessary and started construction of a bridge (Sallaberger Brücke). Expertise later brought evidence that the whole infrastructure project would need a water permit. Finally a water consent procedure was started, but never came to a successful end. The Administrative Court ruled twice that the permit was granted illegally. The Federal Water Law of Austria gave legal standing to neighbours and all persons whose (water) rights could be affected. WWF Austria and other groups and organisations established good cooperation with affected persons and together they twice brought a lawsuit to the Administrative Court and were successful in both cases. As of late 2001 there was no water consent for the project.

With regard to (5), the nature consent (as long as it had not expired) obliged the road construction authority to set ecological compensation measures. To carry them out specific pieces of land were needed, but owners were not willing to sell and an expropriation procedure was initiated. The land owners went to the Administrative Court, which ruled that, according to existing legislation, expropriation for ecological compensation measures was not possible. It soon became clear that the road could not be built legally without setting these ecological compensation measures. The expropriation issue therefore became the major obstacle for the project.

## Final outcome

The court decided that the water consent was granted illegally and the expropriation was not possible. Thus there was no possibility to carry out the project under the current legal situation. In the meantime the law was changed (Lex Ennstal). According to the new provisions, the expropriation for ecological compensation measures would be possible, after carrying out an EIA. But politicians finally decided against the project and found a different solution (improvements along the existing road), although the decree fixing the line of the road (the building permit) still existed at the date of writing the case. One of the main reasons a (political) change was needed was that since Austria became a member state of the EU the Natura 2000 system became legally binding. But the most important factor to the success was the consequent work of NGOs and citizens’ groups providing information, exerting political pressure and using all possible legal remedies.

## Related actions and campaigns

Since Austria became a member state of the EU, a new obstacle was raised for the people in favour of the road construction: The Natura 2000 system. The WWF and other groups objecting to the road project referred to the respective EU legislation at an early stage to stop the project. It was proven that an endangered bird species (*Wachtelkönig*) lives in the project area. A comprehensive complaint was sent to the European Commission, which initiated investigations against the Austrian government. Parallel to this, a LIFE project was carried out in the region to raise awareness.

## Access to justice techniques

Neither the water law of Austria nor the nature protection law of the province of Styria gives a right to the authorities to expropriate land from the owners for this specific case (ecological compensation measures).

The wells of the land owners next to the project terrain were threatened — giving the land owners legal standing in the procedure and proving that the consent was granted illegally.

## Case study analysis

The main obstacles to access to justice were related to the high fees for the lawyers for appeals to the Constitutional Court and the Administrative Court in Austria. This money was provided, among others, by WWF Austria.

Close cooperation between local residents and people from the region, the WWF, the European Commission and other parties involved was an important element in the success of the case.

Using the water consent procedure — where local residents have legal standing — to bring forward all relevant

arguments, and opposing the expropriation by using all possible remedies, were key elements contributing to the success of the case.

At least as important as the legal remedies was the information to all people involved (local, regional and federal politicians) about the facts based on scientific evidence put on the table by NGOs and citizens' groups.

think that implementation of the Aarhus Convention in the Austrian legislation could help or even guarantee that these improvements will be made soon."

— Stefan Moidl

## Comments of participants in the process

"The whole very long story showed that legal standing of neighbours and other persons likely to be affected was the prerequisite for the successful fight for the environment. A future legal standing of NGOs and citizen groups would be a very big step ahead. These groups then would not be dependent on co-operation being established with neighbors/affected persons and could act independently and in addition to them. I

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# Belgium Case 1

## Representative Standing Case

What is considered to be a “personal” and “direct” interest in order to have access to any court in Belgium, be it administrative, civil or criminal, varies from one procedure to the next (and sometimes from case to case), in particular concerning access to justice of environmental organisations.

## Relevant Aarhus provision

- Article 9(2)

## Key issues

- Standing
- Criteria for defining a direct and personal interest

## Case study details

**Cited case name:** Council of State,<sup>2</sup> September 11, 1981, No 21.384, A.S.B.L.<sup>3</sup> Werkgroep voor milieubeheer Brasschaat Supreme Court, November 19, 1982, S.A. Sipedic vs. A.S.B.L. Werkgroep voor milieubeheer Brasschaat

## Parties involved

In front of the Council of State:

**Plaintiffs:** A.S.B.L. Werkgroep voor milieubeheer Brasschaat

**Defendant:** The Flemish Region<sup>4</sup>

In front of the Supreme Court:

**Plaintiff:** S.A. Sipedic

**Defendant:** A.S.B.L. Werkgroep voor milieubeheer Brasschaat.

## Background facts

The matter concerned the designation of the “Eikendael domain” (located in Brasschaat) as being of high ecological value.

An enterprise (S.A. Sipedic) that owns the Eikendael domain wished to build apartment blocks for elderly people in the area. The spatial planning regulation was modified in order to change the designation of the Eikendael domain and thus allow the construction of the apartment blocks.

The A.S.B.L. Werkgroep voor milieubeheer Brasschaat, wanting to protect the area, contested this new spatial planning regulation.

## Procedural history

### In front of the Council of State

In order to challenge an administrative act in front of the Council of State, and according to the case law of the Council of State,<sup>5</sup> the plaintiff must prove a direct and personal interest.

In an environmental context, and regarding individuals, the personal and direct interest is determined with respect to the proximity between the (potential) effects of the administrative act and the individual. What is considered to be a personal and direct interest thus varies from case to case, depending, inter alia, on the nature of the activity authorised by the act (hence, 150 metres between the activity and the residence of the individual may be close enough in one case, and too far away in another).

Regarding environmental associations, the Council of State either examines whether the association is considered to be “representative,” as in the present case, or assesses whether the association’s statutory goal is sufficiently specific and likely to be affected by the administrative act in question (see Belgium Case 3). The Council of State sometimes combines the two criteria.

In this case, the Flemish Region asked the Council of State to assess whether a non-profit organisation, whose

statutory purpose is defined by the founding members themselves, may be considered to have a personal and direct interest in challenging an administrative act in front of the Council of State, and, if so, what distinguishes such an action from the *actio popularis*.

The Council of State replied that:

- Non-profit organisations may defend a public interest, and may define for themselves the level and the nature of the interest they wish to defend (freedom of association).
- The protection of the environment is a public interest.
- In order to be able to challenge an administrative act in front of the Council of State, the non-profit organisation only has to fulfil one condition: it must be considered representative of the group whose interests it claims to defend. According to the Council of State, that condition is fulfilled if the assent (“adhesion”) of the members of the group is so large that it may be assumed that the points of view of the organisation coincide with the points of view of the members of the group the organisation claims to represent. This assumption must be rebutted by the adverse party (in the present case, the Flemish Region failed to rebut the assumption, and A.S.B.L. Werkgroep voor milieubeheer Brasschaat was thus considered to be representative and was granted access to the Council of State).

### In front of the civil courts

Pending the outcome of the annulment procedure in front of the Council of State, the A.S.B.L. Werkgroep voor milieubeheer Brasschaat asked the civil courts (the president of the court of first instance) to suspend the spatial planning regulation.<sup>6</sup>

The president of the court of first instance considered A.S.B.L. Werkgroep voor milieubeheer Brasschaat to have a sufficient interest because the organisation pursues the protection of the environment of Brasschaat and the Eikendael domain (located in Brasschaat) maintains its designation of “high ecological interest.” The court of first instance suspended the regulation.

S.A. Sipedic lodged an appeal against the decision, but the Court of Appeals, on March 12, 1981, confirmed the decision of the court of first instance.

S.A. Sipedic filed a complaint in front of the Supreme Court, contesting whether A.S.B.L. Werkgroep voor milieubeheer Brasschaat should have been granted standing and access to justice under the suspension procedure since, according to S.A. Sipedic, a statutory purpose cannot be considered to be a personal and direct interest.

The Supreme Court agreed with S.A. Sipedic and declared that a personal and direct interest of a legal person only includes its own material and moral rights (reputation), and not its statutory purpose. The Supreme Court ruled that even if the organisation may be consid-

ered to have a personal and direct interest in another context (i.e. the annulment procedure in front of the Council of State) this does not imply that it has a personal and direct interest in front of the civil courts. The Supreme Court thus reversed the decision of the Court of Appeals.

The Supreme Court has confirmed its standpoint several times since, both regarding civil and criminal cases.

### Final outcome

Though the Council of State granted access to the A.S.B.L. Werkgroep voor milieubeheer Brasschaat, the latter failed to convince the Council of State that the spatial planning regulation was illegal. The regulation was thus not annulled.

The inferior civil courts suspended the regulation, but as explained above, the Supreme Court reversed the decisions. In short, the apartment blocks were constructed.

### Related actions and campaigns

None reported.

### Access to justice techniques

The NGO used parallel proceedings to attack the spatial planning regulation before the Council of State and the civil courts.

### Case study analysis

This case presents an obstacle to non-profit organisations wishing to challenge environmentally harmful acts in front of the Belgian civil and criminal courts. As explained above, in determining whether an NGO has standing, the Council of State uses a representative criterion. The Council of State does not, however, specify the “group” that the organisation is supposed to represent.

With regard to the Supreme Court, a personal and direct interest of a legal person only includes its own material and moral rights (reputation) and not its statutory purpose. The A.S.B.L. Werkgroep voor milieubeheer Brasschaat tried to convince the Supreme Court that, since it had been granted access to the Council of State for the annulment procedure, it should also be granted access to the civil courts for the suspension procedure. The Supreme Court clearly refuted the argument: the fact that the association has been granted access to the Council of State does not imply that it should have access to the civil courts. This position of the Supreme Court was confirmed a few years later, in a similar case,<sup>7</sup> where an environmental association tried to convince the Court that access to the Council of State under the annulment procedure is a personal (procedural) right, the effectiveness of which should be protected by the civil courts through the suspension of the contested act pending the outcome of the annulment



procedure.<sup>8</sup> The Supreme Court replied that the alleged procedural right is not enough to counterbalance a “proper” (substantial) right (i.e. the right to construct, granted by the authorisation in question). Some authors have interpreted the position of the Supreme Court to mean that an environmental association might be granted access to justice in front of civil courts if the adverse party does not assert a “proper right.” The Supreme Court has not had the chance to confirm this yet.<sup>9</sup>

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# Belgium Case 2

## Special procedure

Residents joined with a non-profit environmental organisation to make use of a *specific* procedure (*action en cessation*) that the legislature introduced in order to overcome the obstacle detailed in Belgium Case 1, resembling the suspension procedure.

## Relevant Aarhus provision

- Article 9(2)

## Key issues

- Standing
- Procedure for judicial review

## Case study details

**Cited case name:** President du tribunal civil de Namur (President of the civil tribunal of Namur), *refers*,<sup>10</sup> July 31, 2000, Aeroport de Bierset

## Parties involved

**Plaintiffs:** S. Tassier et al.

**Defendants:** S.A. Societe de developpement et de promotion de l'aeroport de Bierset, the Walloon Region, S.A. TNT Express Worldwide, S.A. C.A.L. Cargo Airlines

**Third-party intervenors (for the plaintiffs):** ASBL Inter-Environnement Wallonie

## Background facts

The legislature introduced a *specific* procedure by law on January 12, 1993, resembling the suspension procedure for certain non-profit environmental organisations (as well as for the public attorney and for administrative authori-

ties). However, in order to have access to this specific procedure, the environmental organisation has to fulfil several conditions:

- It must be a Belgian registered non-profit organisation (A.S.B.L.) — this excludes international NGOs.
- It must have existed for at least three years.
- The organisation's statutory goal must be related to the protection of the environment and its by-laws must specify the territorial coverage of the organisation (local, regional, national).
- The organisation must prove that the actual activities of the organisation correspond to its statutory goal.

People living around the Bierset airport (in the Walloon Region), supported by the A.S.B.L. Inter-Environnement Wallonie (the most important environmental organisation in the Walloon Region), asked the president of the court of first instance to prohibit all take-offs and landings between 10 p.m. and 7 a.m. in order to reduce the noise created by the aircraft.

## Procedural history

The defendants (the three enterprises detailed above and the Walloon Region) objected to the standing of the plaintiff (a natural person) and the intervening parties (incl. A.S.B.L. Inter-Environnement Wallonie), contending that they did not have a personal and direct interest in the case. Regarding the legal person (A.S.B.L. Inter-Environnement Wallonie), the defendants referred to the case law of the Supreme Court (see Belgium Case 1) according to which an environmental organisation may not rely upon its statutory purpose for access to the civil courts.

The president of the first court of instance replied that:

- The civil courts have jurisdiction over personal rights (*droits subjectifs*);

- The right to a healthy environment, as provided for in the Belgian Constitution (article 23), is not a personal right *per se*, but is “illustrated” (the president’s own word) by other norms, such as the law of January 12, 1993 creating the special procedure for environmental organisations (see introduction to the present case);
- The A.S.B.L. Inter-Environnement Wallonie may have access to the normal suspension procedure since the organisation would have been granted access under the special procedure and the legislature, by creating this special procedure, recognises the importance of collective interests.

### Final outcome

There was no appeal of the decision of the president of the court of first instance of Namur, since he found that the matter was not urgent, and thus that he did not have the authority to prohibit flights under the emergency procedure.

### Related actions and campaigns

Parallel to the suspension procedure described above, the plaintiffs (and other persons) also filed a classic liability claim in front of the court of first instance of Liege, which decided, on February 9, 2001, to grant standing to a large number of the plaintiffs. The decisions (CFI and

Court of Appeals) were still not publicly available as of August 2002, and the case was still pending before the Court of Appeals.

### Access to justice techniques

Access to justice of A.S.B.L. Inter-Environnement Wallonie was linked to the constitutional right to a healthy environment, linked in turn to the procedural right created by the law of January 12, 1993.

### Case study analysis

Because of the strict conditions for applicability of the specific procedures, few environmental organisations have actually managed to make use of the procedure. By creating the special procedure, the legislature clearly avoided approval or disapproval of the case law of the Supreme Court. In principle, therefore, environmental organisations still do not have access to the “normal” procedures. But the creation of this special procedure has encouraged some inferior courts to bypass the case law of the Supreme Court, as shown by the present case.

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# Belgium Case 3

## Organisational Mission Standing Case

Three NGOs caused the Council of State to examine how the statutory goal of an organisation, which must be sufficiently specific and likely to be affected by the administrative act in question, could confer standing to challenge the act.

### Relevant Aarhus provisions

- Articles 9(2) and (3)

### Key issues

- Standing
- Statutory purpose

### Case study details

**Cited case name:** Council of State, July 7, 2000, no 88.687, A.S.B.L. Reserves naturelles, A.S.B.L. Aves, A.S.B.L. WWF-Belgium

### Parties involved

**Plaintiffs:** A.S.B.L. Reserves naturelles, A.S.B.L. Aves, A.S.B.L. WWF-Belgium

**Defendant:** the Walloon Region

### Background facts

The spatial planning regulation of Liege was modified by the Walloon Region in order to allow the installation of a landfill site on an area called Sur Hez. This area is of great biological interest, namely for the special kind of frog (*crapaud calamite*) that lives there.

Three environmental organisations, wanting to protect the area, asked the Council of State to suspend the spatial planning regulation.

### Procedural history

In order to be able to contest the spatial planning regulation likely to threaten a protected frog species, the plaintiffs — three environmental associations — tried to prove their personal and direct interest before the Council of State as follows:

- The A.S.B.L. Reserves naturelles – whose statutory goal is to promote nature conservation, especially through the creation of natural reserves – owns several natural reserves close to the area in question.
- The A.S.B.L. Aves — whose statutory purpose is to promote nature conservation, and in particular wild bird protection — has shown a great interest in frogs.
- The A.S.B.L. WWF Belgium — whose statutory purpose is to promote, in Belgium as well as in other parts of the world, the conservation of fauna, flora, sites, waters, soils and other natural resources — is interested in the area because it is home to many protected species.

More generally, the plaintiffs asked the Council of State to consider principle 10 of the Rio Declaration and article 9 of the Aarhus Convention.

The Council of State replied that:

- The first part of the statutory purpose of the A.S.B.L. Reserves naturelles (promoting nature conservation) is not distinct from the general interest and therefore cannot be regarded as a personal and direct interest, whereas the second part (creating and protecting natural reserves) is not relevant to contest the spatial planning regulation, since the A.S.B.L. Reserves naturelles has not acquired land and created natural reserves in the area likely to be affected by the regulation.
- The first part of the statutory purpose of the A.S.B.L. Aves (conservation of wild fauna) is not distinct from the general interest and therefore cannot be regarded

as a personal and direct interest, whereas the second part of the statutory purpose (protection of wild birds) does not cover the protection of frogs.

- The statutory purpose of WWF Belgium — to promote, in Belgium as well as in other parts of the world, the conservation of fauna, flora, sites, waters, soils and other natural resources — is not distinct from the general interest, and WWF Belgium did not prove that the frog in question (*crapaud calamite*) is a threatened species (in which case WWF Belgium might have a sufficient interest<sup>11</sup>).<sup>12</sup>

The Council of State thus did not refer to the representative criteria (see Belgium Case 1), nor did it consider article 9 of the Aarhus Convention. The Council of State only examined whether the statutory purpose of each organisation was considered to be sufficiently distinct from the general interest and sufficiently close to the matter concerned (birds/frogs), to find, in the present matter, that none of the three environmental organisations fulfilled these conditions.

### Final outcome

None of the three environmental organisations was granted access to the Council of State. The landfill site came under construction.

### Related actions and campaigns

None reported.

### Case study analysis

This case entails considerable uncertainty: What might be considered to be a personal and direct interest of an association varies — as with natural persons — from one case to the other. The statutory purpose of an organisation often does not help to establish its interest.

### Comments of participants in process

The lawyer of the three environmental organisations said that, had Belgium ratified the Aarhus Convention and had the Convention been in force, then the Council of State might have concluded differently (although the case concerned a regulation and not an individual act cf. article 9, §2 of the Convention).

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# Bulgaria Case 1

## Pirin Mountain Case

Limited opportunity for judicial review and narrow interpretations of procedural rights hindered NGOs' efforts to halt development in Pirin Mountain National Park until officials allowed interested parties to participate in EIA proceedings.

### Relevant Aarhus provisions

- Article 9(2)(b)

### Key issue

- Standing

### Case study details

**Cited case name:** Protection of Pirin Mountain National Park

### Parties involved

**Plaintiffs:** Association for the Wild Nature — Balkani (AWN), Centre for Environmental Information and Education (CEIE), Eco Club 2000, Bulgarian Bird Protection Association, ecological association “For the Earth,” non-governmental association Green Balkans (collectively “NGOs”)

**Defendant:** Ministry of Environment and Waters (MOEW)

**Third-party intervenor** (for defendant): Municipality of Bansko JULEN, interested investor

### Background facts

Pirin Mountain National Park, located in southern Bulgaria, is a UNESCO natural site (one of only 18 such sites in Europe protected under the Convention for Protection of the World Natural and Cultural Heritage).

Over the past 10-15 years several attempts have been made to build ski resorts in the area, including some that would extend into the national park. Before 1998, several of these efforts were successful. In 1998, however, the Protected Areas Act (PAA) was passed designating national parks as protected areas and prohibiting the construction of new sport facilities (article 21, para.1 of PAA). Consistent with this act, the national park was operated under a management plan regulating growth and use of the park.

The Municipality of Bansko, located adjacent to the park, had a thriving winter tourism industry and sought to develop a ski resort complex that would extend to portions of the Pirin Mountain located within the park. The development plan for this complex — The Plan for Development of Ski-Zone-Centre Bansko (“the Plan”) — directly contravened the park management plan.

Providing for the clear-cutting of 60 hectares of pine trees and dwarf pine, the Plan was submitted to the MOEW for an environmental impact assessment (EIA) in 2000. In July 2000, MOEW granted conditional approval of the Plan. Three conditions (paragraphs 11, 12 and 13 of the decision) required that Bansko supply missing data and information within the EIA. In effect, MOEW's acceptance of the Plan, which legally must turn, in part, on a complete EIA, was already granted and awaited necessary changes to become official.

MOEW never made amendments to the Plan or made the EIA report publicly available, nor did the agency invite citizens or NGOs to participate in the decision-making process.

### Procedural history

NGOs filed a complaint before the Supreme Administrative Court (court of first appeal), seeking to challenge MOEW's decision. In asserting their claim, NGOs made the following legal arguments:

- The Plan contravened the national park's management plan in that proposed activities within the protected



area as well as outside the area would endanger several protected species of animals and plants. Further in-park development would destroy protected habitats of pine trees and dwarf pines.

- MOEW's conditional acceptance of the Plan was in violation of EIA procedures that state if an EIA is incomplete, the report must be sent back to the submitting party.
- In accordance with the Environmental Protection Act (EPA), MOEW's decision at this stage of review should have been considered a "positive EIA decision" and not an "approval" of the Plan. MOEW's acceptance of the Plan was premature.

The court dismissed the claim, given MOEW's instructions to amend the EIA, holding that a final decision had not been made and thus the NGOs' lawsuit could not yet be reviewed on administrative appeal.

In February 2001, upon word that paragraphs 11, 12 and 13 were fulfilled and MOEW had approved the Plan, two of the NGOs, the Association for Wild Nature (AWN) and the Centre for Environmental Information and Education (CEIE), resubmitted their complaint before the Supreme Administrative Court.

In addition to the prior arguments, the two NGOs asserted that the approval process was invalid because the MOEW never submitted the amended version of the Plan and the EIA report to public discussion (article 23a of the EPA).

The NGOs requested that the court hear the testimony of independent experts who would address the amended Plan and EIA report, in particular whether they met MOEW's conditions and whether the Plan would lead to the destruction of protected species and habitat.

On July 12, 2001, the court ruled in favour of MOEW. In its decision, the court stated the following:

- While some plants, animals and habitat would be destroyed, the development would not lead to the destruction of an entire species nor impede the reproduction of these species.
- Clear-cutting would occur but to a minimum extent.
- The court stated that the Plan did not contravene the park's management plan, but rather replaced it (this is arguably a mistake of fact — the proposed Plan only refers to a portion of the national park to be used in conjunction with development outside the park).

The court did not address the claims that MOEW's EIA was invalid for want of proper participation procedures. The court's only reference to the topic was to say that the original EIA *was* submitted for public discussion. It failed to discuss the amendments to the Plan or the EIA.

## Final outcome

On July 10, 2001, two days before the court's decision, the Bulgarian Council of Ministers conceded the right to use part of the national park to Bansko. Under this decision, the conceded portion of the park, considered exclusive state property, was leased to Bansko as concessionaire. That party is obliged to invest in the park and after a certain period (20-30 years), the park reverts to state ownership.

The two NGOs submitted an appeal of the court's decision to a higher court (cassation appeal). The appeal was rejected by the Administrative Court in September 2001. The motives of the Appeals Court (consisting of five members of the Supreme Administrative Court) were similar to those formulated by the court of first instance.

The case was still pending in 2002, however, because the MOEW submitted to separate EIA procedures of all the ski runs in the Plan after the approval of the Plan for Development of the Pirin Mountain — Region Bansko. These procedures finished with EIA decisions, issued by the MOEW. These decisions were appealed in the Supreme Administrative Court and the Court had not pronounced its decisions.

Meanwhile, the MOEW adjusted its procedures from the end of 2001 to stipulate — in some of its decisions containing conditions — that the decision will enter into force (and will be published) after the conditions provided in the decision are fulfilled. However, the MOEW has not applied this approach to all EIA decisions, which still required clarification (this is the question of the equal application of the law to the different persons).

## Related actions and campaigns

The NGO community started a campaign to lobby the MOEW to stop the concession procedure. In July 2001, NGOs and several other organisations requested an open meeting with MOEW officials to discuss the matter. The meeting took place on August 10 and yielded valuable information that was used in the appeal. But there was no resolution of the matter.

In addition, in July and August 2001, and again in 2002, NGOs organised a series of press conferences, and other meetings and campaigns to promote their position.

## Access to justice techniques

NGOs challenged the government's decision through participation in approval proceedings, administrative appeals and by filing legal complaints for judicial review.

In the course of judicial review, NGOs requested that the court review the EIA report independently, rather than relying solely on the testimony of the government agency. Towards this end, NGOs offered the testimony of experts and their own findings.

## Case study analysis

Both the court's refusal to hear expert testimony independent of MOEW and its failure to address possible procedural violations bring into question the degree to which the court was independent in its review.

Moreover, the court's erroneous conclusion concerning citizens' right to review amended documents and participate in attendant discussions suggests that participatory rights have yet to move to the forefront as essential issues in judicial reviews.

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# Bulgaria Case 2

## Elshitza Case

Substantive violations of the EIA rules were ignored by the court of first instance and a request for an injunction to stop the illicit activity was rejected despite clear evidence submitted by the plaintiff.

### Relevant Aarhus provisions

- Articles 9(3) and (4)

### Key issues

- Direct enforcement
- Injunctive relief
- Fair, timely and equitable review procedures

### Case study details

**Cited case name:** Angel Petrov v. Marin Blaguiev — tradesman by profession

Elshitza case — lawsuit against illicit waste transportation and storage initiated by the local initiative committee with the District Court in Panagurishte.

### Parties involved

**Plaintiffs:** Angel Lazarov Petrov on behalf of the Elshitza local committee

**Plaintiff's representation:** Ecological Association Demetra

**Defendants:** Marin Vassilev Blaguiev — tradesman by profession

**Third-party intervenors** (for the defendant): Eco Elshitza Llc, Elshitza Village; Niciola Pushkarov Institute for Soil Information

### Background facts

A waste sedimentation basin existed near the village of Elshitza. During the 20-30 years prior to the case, it had served the copper mine Elshitza. After the completion of the deposits, the mine stopped operating and the sedimentation basin became a reclamation project. Several proposals had been submitted, and after the EIA was conducted one project was selected. It provided a clay sealing layer followed by a soil covering and forestation with acacia and other suitable tree species. The project kicked off in early 1999, but was stopped soon after. The Ministry of Industry shifted its support to another project which called for sealing the waste copper sediments with so-called “soil cement” (polymeric material) and then covering it up with stabilised sewage sludge originating from Plovdiv’s wastewater treatment plant. The project was proposed by Marin Blagiev who was issued a waste transportation and storage permit by the Ministry of Environment and Waters (MOEW) on February 22, 2000. The identification code of the waste cited in the permission was 19.08.05, which classified it as non-hazardous.

In Plovdiv, the second largest city in Bulgaria, several factories do not have wastewater treatment plants and regularly discharge industrial wastewater in the city sewage system. For this reason, the sewage sludge from the plant was deemed the seventh largest hazardous waste substance in the country in 1997.

When the new project for transportation, storage and use of this waste to fertilise grazing land near the village Elshitza began without an EIA or public participation, some Elshitza inhabitants founded a local initiative committee to oppose the government’s decision.

### Procedural history

The chairman of the committee, Angel Petrov, filed a personal complaint stressing the violation of his human rights as a hedge against eventual objections concerning the standing of the committee. The claim was lodged at the

Panagjurishte District Court against the executor of the project. The main thesis was that the defendant had intentionally misled the MOEW in its permit application by claiming the sewage sludge from the Plovdiv treatment plant was not hazardous. The defendant knew that the Plovdiv plant treated both city and industrial wastewater because some of the local factories did not have their own plants.

The plaintiff asked the court to invalidate the permit and to order the defendant to cease the transportation and storage of the dangerous waste near the Elshitza village. The court was also asked for an injunction prohibiting continued transportation of the sludge in order to prevent further damage, but this request was rejected.

During the proceedings an ecologist conducted a chemical analysis and confirmed the conclusions of several preliminary experts' reports that the sewage sludge was hazardous according to national legislation.

The court ignored these conclusions and did not take into account the law approving the annual report of MOEW for 1997. Instead, the court granted the defendant's assertion that the absence of a special section for hazardous waste treatment in the plant proved that the sewage sludge was not hazardous. The claim was rejected and the defendant submitted a demand for excessively high court expenses.

The third-party intervenors had been called to join the process in order to help the defendant without having any particular interest. They did not help substantially, but their absence caused the hearings to be postponed several times while the defendant was continuing the waste transportation activities.

During the hearings, the ecologist changed his conclusion in favour of the defendant. The court did not raise the question of false testimony even though the expert clearly gave contradictory explanations for the same facts.

The permit was issued without an EIA or public participation in the decision-making process in contradiction of the Environmental Protection Act and the Regulation for Environmental Impact Assessment. The EIA was completed by the time the project wrapped up, but the MOEW had refused to stop the activity.

In the proceedings, it was claimed that the issuing of the permit was legally defective in several ways:

- The new project did not have a complete EIA procedure, and a public participation procedure had not occurred before the issuing of the permit.
- The MOEW did not take into account that the Plovdiv wastewater treatment plant treated not only ordinary city wastewater but some industrial water as well. The latter contained many hazardous substances because some of the factories discharged directly into the sewage system without pretreatment.

- The MOEW did not take into account its annual report for the state of the environment for 1997 approved by the Parliament and published in the National Gazette. In this report, the MOEW pointed out that Plovdiv's wastewater plant was the seventh largest dangerous waste site in Bulgaria at the time. One of the motives for the waste transportation from the vicinity of Plovdiv was to solve a major ecological problem of the village where the waste was initially stored.

## Final outcome

During the first instance proceedings, waste transportation and storage continued.

The plaintiff appealed the first instance court judgement before the Pazardjik Regional Court, but the second instance proceedings had not begun by mid-2002. The reason for the delay was a gap in procedural rules concerning the delivery of the subpoenas and other messages, including judgements, to the litigants.

In addition, during five months of proceedings, the Supreme Administrative Court still had not delivered subpoenas to the MOEW or Marin Blagiev's company.

## Related actions and campaigns

The members of the Elshitza committee made every effort to stop the project. They met with members of Parliament, two successive environmental ministers, local authorities and journalists. The committee members staged campaigns for civil disobedience. They managed to persuade the mayor of Panagjurishte to issue an ordinance to stop the waste transportation, which was shortly thereafter rescinded by the regional governor.

## Access to justice techniques

The committee filed a complaint at the Panagjurishte District Court against the holder of the waste transportation and storage permit. However, it also filed complaints with:

- the MOEW to cancel the permit and to compel the defendant to stop the waste transportation; and
- the Supreme Administrative Court against the MOEW.

## Case study analysis

The first instance court neglected clear, substantial violations of the law — the EIA was not carried out as required by article 20 of the Environmental Protection Act and the Regulation of the EIA; the proposed new project was not discussed publicly; and the permit was issued in violation of a law defining this particular waste as hazardous. All of these were reasons to invalidate the permit.

The court refused to issue an injunction against the

illegal activity, giving the defendant the opportunity to cause further environmental damage during court proceedings. The law defining hazardous waste was ignored along with other facts proving the presence of hazardous substances in the sewage sludge stored near Elshitza.

The civil procedure is not geared to dispatch cases with major public interest because the terms provided are not clearly defined and defendants can prolong the procedures in many ways. In particular, the gap in procedural rules concerning delivery of subpoenas and other documents allowed litigants to prolong cases without justification.

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# Czech Republic Case 1

## Sumava

Czech NGOs seeking judicial review of state logging practices in Sumava National Park were blocked by rigid standing requirements failing to recognise an NGO's broad environmental interests as actionable.

## Relevant Aarhus provisions

- Articles 6(3) and (4), 9(2) and (3)

## Key issues

- Administrative standing
- SLAPP suits
- Review of public participation in decisions on specific activities
- Environmental and human rights protection

## Case study details

**Cited case name:** Logging in the Core Zone of the Sumava National Park

## Parties involved

**Plaintiffs:** Hnutí DUHA (Friends of the Earth Czech Republic — hereafter NGO)

**Plaintiffs' representation:** Environmental Legal Service, a public interest legal organisation

**Defendants:** Sumava National Park Authority, administrator of Sumava National Park; Czech Ministry of Environment — reviewing authority for appeal against first-level decisions

## Background facts

From 1998-2001, the Sumava National Park Authority ("Sumava") logged throughout an area within the park designated as Zone 1, or the most strictly protected zone in terms of conservation. The stated justification was control of bark beetle infestations. Despite the logging, the beetle population expanded, spurring increasing protests from environmental and inter-governmental groups, including the IUCN and WWF, that the tree-cutting actually contributed to the infestations.

In seeking permission to log in Zone 1, Sumava's Forest Management Department (forest maintenance body) requested a permit from Sumava's State Administration Department (forest supervisory body) pursuant to the Czech Forestry Act. According to the Act, the decision to log could come only through an administrative procedure, in which interested parties could apply to participate in the proceedings and offer recommendations in the course of decision-making. However, the party requesting permission to log and the party making the final decision are, in fact, departments within the same governmental body.

In cases like these, delays in initiating public proceedings are common. Moreover, when a party seeks an appeal of the State Administration Department's decision, the department typically overrides any injunction, citing time pressures and the urgency to begin logging.

The Ministry of Environment ("Ministry"), which oversaw the Sumava Park Authority, consistently supported the park's logging policy and handling of the approval proceedings.

In 1998, in order to expand logging operations beyond Zone 1, the Sumava Park Authority requested from the Ministry an exception to the legal protection regime of specially protected species of plants and animals provided for in the Landscape and Nature Protection Act. According to this Act, exceptions are possible only when another public interest overrides the wish to protect designated species. The Ministry granted the exception stating that the logging operation was itself an act of environmental



protection and therefore no conflict existed with the aims of the Act.

Hnutí DUHA (Friends of the Earth Czech Republic), a regional environmental NGO, filed administrative complaints in response to both the Ministry's granting of the permit and the Sumava Park Authority's approval of logging in Zone 1.

### Procedural history

Every year when Sumava Park managers applied to log in Zone 1, the NGO participated in the attendant decision-making proceedings.

In response to the park authority's approval of logging, the NGO filed administrative appeals to the Ministry. Each year, the following assertions were made:

- **Procedural Violations** — The conflict of interest in having park authorities decide whether park managers can conduct logging prevented independent decision-making and was in violation of the Czech Administrative Procedure Act (APA). Moreover, the NGO asserted that delays in initiating public proceedings, suppressing information, and the commencement of logging amid judicial appeals also contravened the APA.
- **Environmental Substantive Violations of Law** — The approval of logging in Zone 1 was in violation of the Sumava National Park Act and Landscape and Nature Protection Act.

Each year, the Ministry ruled in favour of Sumava authorities. Subsequently, the NGO filed complaints before the High Court in Prague, reasserting the above arguments and the following:

- undue prejudice by the Ministry in allowing logging to commence; and
- denial of the right to a fair administrative hearing in violation of Declaration of Fundamental Rights and Freedoms, article 36.

### Ministry exceptions to the Landscape and Nature Protection Act for logging

The NGO filed a complaint before the High Court in Prague, seeking judicial review of the Ministry's decision to allow an exception to the Landscape and Nature Protection Act for logging purposes. To have its complaint considered by the court, the NGO argued that, as the Ministry had a duty to "act/proceed according to law," the right must therefore exist for participants in related decision-making processes to ensure that this duty is carried out, citing section 3 of the Administrative Procedure Act.

The High Court did not grant the NGO standing,

holding that "the rights of NGOs could not have been violated, because NGOs have no substantive rights in similar administrative processes." The court further added that violating the law in itself does not constitute interference with the substantive rights of NGOs.

Using its constitutional right to bring a complaint to the Constitutional Court of the Czech Republic against interference with basic constitutional rights, the NGO filed an appeal asserting a violation of the Declaration of Fundamental Rights and Freedoms, article 36 (right to a fair trial). The NGO argued that a substantive right existed in the right to a lawful decision-making process (again citing section 3 of the Administrative Procedure Act).

The Constitutional Court ruled against the NGO, holding that participants in such matters have only "procedural rights," which do not include the right to a lawful decision-making process.

Additionally, the NGO filed a complaint with the National Environmental Monitoring Agency and later filed a criminal complaint against the responsible employees of the Sumava National Park Authority.

### Final outcome

In response to the Constitutional Court's ruling, the NGO filed a complaint with the European Court of Human Rights (application) under article 34 of the European Convention of Human Rights, asserting that the Czech court acted in violation of article 6, section 1 of the Convention — denying it a right to a fair trial. The complaint was refused.

The National Environmental Monitoring Agency found that there was a violation of law and imposed a financial penalty on the responsible bodies. The criminal proceeding was still ongoing in August 2002.

### Related actions and campaigns

In 1999, Hnutí DUHA organised a three-month, non-violent blockade of Zone 1. The Environmental Law Service provided legal counsel to participants and represented eight of the accused in settlements with authorities. In ensuing lawsuits, the law service defended the individuals. Misdemeanour proceedings against the individuals eventually ended due to the statute of limitations.

In 2001, members of the Czech Parliament, dissatisfied with the Sumava National Park Authority's actions, proposed reducing the area of the national park. In the meantime, the Environmental Law Service (ELS), the NGO's legal counsel, prepared an alternative bill proposing exclusion of Zone 1 from logging, while addressing the factors motivating the clear cuts. Neither bill was passed and the matter was expected to be taken up by the new Czech government formed in July 2002.

### Access to justice techniques

The NGO attempted to challenge the government's decision through participation in approval proceedings, administrative appeals, and by filing legal complaints for judicial review. The case was finally appealed to the European Court of Human Rights. In related actions, the NGO filed criminal complaints.

### Case study analysis

To hold that citizens only have a procedural right to participate in proceedings but no vested interest in seeing that the procedures are lawful is to frustrate the very purpose of citizen involvement. The right to speak alone is an empty grant to citizens and a substantial barrier to accessing justice. By their rulings, the courts relegate citizen participation to a "feel good" gesture rather than allowing it to be an effective safeguard and check on government action.

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# Czech Republic Case 2

## Gravel Mining Case

A Czech NGO seeking judicial review of state logging practices in the Sumava National Park was blocked by standing requirements that failed to recognise an NGO's broad environmental interest as a basis for standing.

### Relevant Aarhus provision

- Article 9(2)

### Key issues

- Review of public participation in decisions on specific activities
- Administrative Standing
- Extraordinary legal remedy/review

### Case study details

**Cited case name:** Village Nedakonice v. Gravel-Mining Company Sterkovny Ostrozka Nova Ves

### Parties involved

**Plaintiffs:** Village Nedakonice

**Defendants:** Gravel mining company Sterkovny Ostrozka Nova Ves; Regional Czech Mining Office

**Third-party intervenors:** Environmental Law Service (ELS), an environmental public interest legal organisation; citizens association of Nedakonice community (not a party to lawsuit)

### Background facts

Beginning in 1997, Nedakonice, a village along the Czech-Slovakian border, contested the proposed develop-

ment of a gravel mining operation by Sterkovny Ostrozka Nova Ves (Nova) next to the village. Amid constant objections from village authorities and residents, Nova took its proposed mining operation through the required three-step assessment and permitting process.

During the first stage, conducted in 1998, the mining company filed its claim to a mineral deposit and sought to prevent any other development on the subject property. According to Czech regulations, the Ministry of the Environment and the Regional Czech Mining Office oversaw this stage, conducting an environmental impact assessment (EIA) of the site. In addition, it had become the unstated policy of mining officials that only mining companies were permitted to participate in this first stage — regardless of the site's proximity to a community.

In 1999, the case entered its second phase in which the boundaries of the mining site were defined by the Regional Czech Mining Office. According to regulations, nearby municipalities and residents had a right to participate in determining the surface area of the mining operation. However, similar to stage one, the Mining Office seldom allowed public participation in practice. In previous cases, the Mining Office had stated that because mining does not officially take place after this stage, substantive rights are not actually affected.

During the first two stages, plaintiffs sought to participate in the proceedings and ultimately sought judicial review of the decisions of the Mining Office (the case did not involve the third stage — actual commencement of mining activities).

### Procedural history

#### Stage One

Plaintiffs filed an extraordinary appeal before the Central Czech Mining Office, challenging the granting of Nova's mineral deposit claim.<sup>13</sup> Plaintiffs claimed that denying nearby residents the opportunity to participate in the proceeding violated their right to a fair trial by an inde-

pendent and impartial court or other state body and the right to demand protection of their rights, citing the Declaration of Fundamental Rights and Freedoms, articles 11(4) and 36(1). In addition, plaintiffs asserted that the owners were in fact affected by the establishment of the mining claim in that it foreclosed all other uses of the land.

The Central Czech Mining Office dismissed the appeal. The plaintiffs did not appeal.

### Stage Two

During stage two, only the Environmental Law Service was able to take part in the proceedings. Curiously, while an NGO was able to participate in a proceeding concerning the proportions of surface area of the operation, mining officials ruled that the matter would not affect the village of Nedakonice and therefore they could not participate.

Two strategies were pursued in appealing this ruling:

1) Plaintiffs appealed this decision on behalf of the village before the Central Czech Mining Office. The appeal was summarily dismissed.

Subsequently, plaintiffs brought an appeal before the Constitutional Court of the Czech Republic, asserting that the Mining Office's denial of participation violated article 100 of the Constitution (right of communities to self-government) and the Declaration of Fundamental Rights and Freedoms, article 36(1) (right to fair trial) and article 36(2) ("when a state administration body affects one's rights, that person make seek judicial relief").

In 2000, the Constitutional Court dismissed the plaintiffs' complaint, holding that a complaint should be submitted upon a final decision in the proceedings (i.e. when a final decision on issuance of a permit had been made).

2) In a separate complaint before the Central Czech Mining Office, concurrent with the first, plaintiffs asserted that, in denying the village from participating, mining officials violated the Landscape and Nature Protection Act, the Water Pollution Act, the Administrative Procedure Act and constitutional legislation. In 2000, the Czech Mining Office dismissed the appeal.

### Final outcome

Plaintiffs brought an administrative appeal of the latter decision, a matter that was still pending as of July 2002. The Constitutional Court's decision dismissing ELS's complaint was the final decision on the appeal of the area determination. The parties planned to challenge the third

stage (commencement of mining activities) decision if it permitted the mining to take place.

### Related actions and campaigns

Plaintiffs prepared leaflets for local citizens concerning legal protection of proprietary rights and rights to public participation in decision-making.

In addition, ELS, besides providing legal aid, advised the village on how to increase the natural value of its surrounding countryside via revitalisation. In this effort, it enlisted the Moravian Regional Museum in Brno, which wrote a biological monitoring study for the territory in question and assisted in developing an outline of the overall revitalisation project.

### Access to justice techniques

Plaintiffs attempted to challenge the government's decision through participation in approval proceedings and administrative appeals and by filing legal complaints for judicial review at each stage of the approval process. They used the interesting legal tool of the extraordinary legal remedy to collaterally challenge the legality of a decision.

### Case study analysis

Denying nearby villages and their residents the right to participate in any stage of a mining permit proceeding sends a strong signal that public participation rights may still be a hollow promise in the Czech Republic. Mining officials' refusal to grant local residents the opportunity to be heard points to a government agency still beholden to private interests — a problem that can only be resolved in court. Plaintiffs' appeals and lawsuits, while proceeding unsuccessfully at the moment, will pave the way for greater access to justice by the precedents they establish and the citizens they motivate.

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# Czech Republic Case 3

## Bohemian Highway Case

Hindered by not being able to seek judicial review until the tendering of a final decision on a massive highway project, environmental NGOs employed various strategies at essential preliminary stages that would have benefited from judicial scrutiny.

### Relevant Aarhus provisions

- Articles 6(4), 9(2) and (3)

### Key issues

- Review of public participation in decisions on specific activities
- Administrative review procedure
- Adequate and effective remedies

### Case study details

**Cited case name:** Building of the D8 motorway through protected areas in northern Bohemia

### Parties involved

**Plaintiffs:** Children of the Earth Czech Republic, an environmental NGO

**Plaintiffs' representation:** Environmental Law Service, a public interest legal organisation

**Defendants:** Ministry of Environment; Road and Motorway Directorate of the Czech Republic (RMD), the state body responsible for building and maintaining highways; District Office in Usti nad Labem, responsible for the administrative procedure in issuing building permits

### Background facts

In 1963, the communist government approved a plan for the construction of new highways throughout the former Czechoslovakia, including the proposed D8 Motorway, which was never constructed. However, in 1993, four years after the Velvet Revolution, Czech officials resurrected the highway plan as a way to boost the economy. The D8 Motorway was part of the new plan.

Prior to 1993, however, the land through which the D8 Motorway would run was designated as the Ceske Stredohori Protected Area. The planned highway would also traverse the Krusne Hory Nature Park.

Under the Czech Nature and Landscape Protection Act, highway construction was prohibited in designated protected areas, except for limited exceptions granted by the Ministry of Environment for the promotion of “public interest.” Citing economic factors, the Ministry granted an exception for the D8 Motorway, allowing approval proceedings for the project to commence. As Czech law requires that the District Planning Office grant permission for the construction of a proposed route through a nature park, this permit was applied for and granted.

The Children of the Earth CZ and the Environmental Law Service (“NGOs”), two regional environmental NGOs, opposed these decisions. However, judicial review of the Ministry’s decision or any other decision during preliminary proceedings was not permitted according to Czech administrative law. Only final permit decisions could be reviewed by the Administrative Court. As a result, the NGOs’ only recourse was to participate in every stage of the proceedings leading to a final decision and attempt to influence decision makers.

### Procedural history

#### Environmental Impact Assessment proceedings (1994-1995)

In 1994, officials conducted EIAs for the two crucial sections of the D8 Motorway that traversed the designated

protected area and nature park. The NGOs participated in this process, filing a complaint that officials were breaching EIA procedural rules and refusing to assess alternate routes around the areas. Most importantly, officials were conducting EIAs for individual segments of the highway only. The NGOs asserted that to understand the full environmental impact, an EIA for the entire proposed highway should be conducted.

The NGOs' objections mirrored similar complaints made nationwide throughout the 1990s. However, officials failed to act on their concerns. In the absence of a final decision, judicial review of the EIA proceeding was not possible.

### **Ministry's exception to the Nature and Landscape Protection Act (1998-2000)**

In 1995, the RMD asked the Ministry of Environment for an exception from the prohibition of building a motorway in the Ceske Stredohori Protected Area. This was very significant, as an exception to the Nature and Landscape Protection Act had never before been granted for a highway project. The administrative procedure that followed was crucial to the motorway project and ended with the Ministry denying the permit in 1998. However, the RMD appealed to the minister and the refusal was reversed. In 2000, the Ministry issued the exception from the law.

The NGOs had delivered testimony asserting that the public interest in protecting the natural resources in Ceske Stredohori was more important than the interests served by constructing a motorway through the area. In the issued exception, the Ministry rejected this opinion, stating that the motorway was in fact in the public interest, of greater importance than keeping the protected area free of highways.

Again, judicial review of the Ministry's decision was not an option given that an overall decision on the highway had not yet been made.

### **Permission to traverse Krusne Hory Nature Park (1999-2000)**

In this procedure, the District Planning Office had to consider the extent to which the planned motorway would interfere with the landscape character of the park and to consider feasible alternate routes. NGOs testified in this proceeding, making concrete suggestions and alternative solutions, which were set aside. The District Planning Office approved the planned route in 1999 and the Ministry affirmed this decision in 2000.

### **Construction placement permission (2000-present)**

According to procedure, permission to begin a highway project is issued by the District Planning Office and is conferred one segment at a time. Typically, the granting of a construction permit — the final decision — is a routine decision influenced heavily by the preceding

stages. The NGOs testified against permit approvals for the two segments crossing the protected area and nature park.

The NGOs lost their case against permitting construction on the segment through the nature park. The permit was issued in the spring of 2002, but the NGOs' appeal against this decision was still pending in July 2002. The NGOs' main argument was that an international EIA procedure was required pursuant to the ESPOO Convention because this section of motorway was next to the border with Germany. In addition, they claimed that there were potential conflicts between the plan and EU environmental law, especially the Habitats Directive (92/43EEC).

### **Final outcome**

The NGOs planned to file a complaint before the Administrative Court when finally able to seek judicial review. Their hope is that the highway would be rerouted into a tunnel beneath the protected area. They also held out the prospect to go to EU authorities with a complaint about violation of EU law after the Czech Republic's accession.

### **Related actions and campaigns**

- Children of the Earth and other local NGOs conducted several non-violent demonstrations.
- Children of the Earth ordered several expert studies to explore alternate routes and improvements to the existing plan. These were mostly ignored by officials.
- As construction of the motorway was to be partly financed by the EU, NGOs planned to notify responsible EU authorities that the motorway would cross a protected area that was a candidate for a listing on the EECONNECT network.

### **Access to justice techniques**

While NGOs fully used their participation rights, they also attempted to challenge interim decisions.

### **Case study analysis**

Administrative review of interim decisions was unavailable. In the Czech legal system, administrative review is only available after the rendering of a final construction location permit. This fails to take into account the fact that a myriad of important decisions happen along the way to the final decision. The instant case clearly illustrates this. For example, the EIA conducted in the first stage and the Ministry's exception in the second are junctures where the possibility of judicial review would at least prove helpful. Each of these steps informs decisions made in the next. Thus, if citizen participants and other interested parties

observe a flaw in reasoning or law by the government, the courts can be used to correct such a mistake. Restrained by appropriate standards of review, this potential involvement of judicial scrutiny at essential stages would increase overall efficiency and ensure that decisions are grounded in law and truly mirror the public interest.

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# Georgia Case 1

## Defence of National Park Case

In the Tbilisi Regional Court, hearings of administrative cases take too long (sometimes more than a year) because judges are overloaded. This court has one appellate court chamber with only six judges. There are no regulations to speed up this procedure. Other obstacles include legal expenses and standing barriers.

### Relevant Aarhus provisions

- Articles 9(2) and (5)

### Key issues

- Temporary stays
- Standing (sufficient interest)
- Financial and other barriers

### Case study details

**Cited case name:** National Park Without Land

### Parties involved

**Plaintiff:** Emzar Chachanidze, chairman of the activist group

**Defendant:** The State Committee of Georgia for Land Use and Protection

**Defendant's representation:** Legal Society Association

**Third-party intervenor:** WWF Georgia

### Background facts

In 1995, the Cabinet of Georgia issued Bill 447 concerning the creation of Borjomi-Kharagauli National Park. The World Wildlife Fund (WWF) was involved in the

process of creating the park. According to an agreement between the governments of Georgia and Germany, the creation of the national park was to support employment and improve the social security of the residents of the Borjomi-Kharagauli region.

On January 12, 2000, the Local Authority (Gangeoba) of the Kharagauli District issued a notice concerning the allocation of land to the national park. On July 5, 2000, the State Committee of Georgia for Land Use and Protection issued an administrative act approving the local authority's notice and determining the procedures of the land allocation.

Emzar Chachanidze organised a meeting of farmers from local villages and told them that the creation of a national park would limit their rights to logging and hunting, as well as their traditional use of grasslands. Most of the arguments of Chachanidze were misinterpretations of the aims of the National Park Project. The farmers organised into a group of activists with Chachanidze as chairman and began a campaign against the park. (A big part of the local population of Kharagauli District supported the creation of the national park).

### Procedural history

On August 2, 2000, Chachanidze challenged the administrative act of the State Committee of Georgia for Land Use and Protection in the Tbilisi Regional Court. The plaintiff tried to prove that the administrative act on allocation of land for the national park violated the rights of the local population and that representatives of local villages had not been involved sufficiently in the decision-making process by the State Committee of Georgia for Land Use and Protection. He asked the court to abolish the act on allocation of land to the national park.

The Tbilisi Regional Court transferred the suit to the Krtsanisi-Mtatsminda District Court.

To prove his sufficient interest in the case, the plaintiff used the following arguments:

- Because of the act on allocation of land for the national park, herders were not able to use traditional grasslands and the resident citizens could not use the forests to cut firewood.
- The Kharagauli District is a high mountainous region and, according to the Constitution, the state has to provide maximum social support to the population of high mountainous villages.
- The state is limiting the population's rights. Consequently, the administrative act violates the legal rights of citizens and has to be abolished.

The judge found the plaintiff's arguments to be acceptable and based his decision on them. On March 30, 2001, the Krtsanisi-Mtatsminda District Court pronounced the abolishment of the administrative act on the allocation of land to the national park.

The Legal Society Association (LSA) was requested by the WWF to help the State Committee of Georgia on Land Use and Protection to file an appeal against the decision of the Krtsanisi-Mtatsminda District Court. LSA was not entitled to appeal the court decision as an NGO because it was not a party involved in the case. LSA received power of attorney from the chairman of the State Committee of Georgia for Land Use and Protection (the chairman of this committee is a state minister of Georgia, Mr. G. Arsenishvili).

Neither the State Committee of Georgia for Land Use and Protection nor the Legal Society Association had funding for this case. LSA provided free legal support to the land-use committee, taking an appeal to the Tbilisi Regional Court on May 18, 2001, in hopes of reversing the Krtsanisi-Mtatsminda District Court decision ordering the administrative act to be abolished.

### Standard on appeal

To reverse the Krtsanisi-Mtatsminda District Court decision, according to the Procedural Code, LSA had to prove on appeal that:

- the plaintiff did not have a sufficient interest in this case; and/or
- the court had inadequate legal support for its decision, therefore the decision was illegal and groundless.

LSA intended to argue the following on appeal.

### *Standing*

According to the Administrative Procedural Code of Georgia (article 22), an administrative act can be appealed in court only when this act has an impact on the personal legal rights of the plaintiff. Thus, the plaintiff has to prove his sufficient interest in the case.

In court, the plaintiff claimed to be the chairman of the activist group of the local community, but he had no power

of attorney from them. Consequently, he was representing only his personal interests. The plaintiff resided in the Kharagauli District, but he was not a herder and the decision did not impact his rights. Furthermore, reasonable use of traditional grasslands and limited cutting of firewood for the local population in the territory of the national park (according to official statistics, these limits were more than enough for the resident farmers) were to be allowed. The plaintiff never applied to the park administration for permission to cut firewood and therefore he was never refused. The plaintiff's personal rights were thus not violated by this act, and he did not have a sufficient personal interest.

### *Inadequate legal grounds for decision*

Alternatively, LSA could prove that the District Court had inadequate legal support for its decision and, accordingly, the decision was illegal and groundless. As the legal association asserted in its appeal, Georgia has a special law about social economic and cultural development of high mountainous regions. This law lists all such regions in Georgia, and the Kharagauli District is not among them. So the Kharagauli District is not a high mountainous district and the judge erred when he based his decision on this argument.

### *Fees*

Court fees for the appeal were not substantial and the state committee paid them in advance. LSA could have had a problem if the court fees were more because the state committee did not have its own budget. The plaintiff did not have this problem because, according to article 9(4) of the Administrative Procedural Code of Georgia, failure to pay court fees by a physical person does not hamper the consideration and decision of a case. According to article 47 of the Civil Procedural Code of Georgia, a judge can exempt a citizen from court fees. NGOs, public agencies and other organisations do not have such a privilege and have to pay court fees. Advance payment is usually required.

The Tbilisi Regional Court had not yet held hearings on this case as of August 2002.

### Final outcome

In August 2002, the case was before the Tbilisi Regional Court awaiting a hearing of the appeal. The Krtsanisi-Mtatsminda Court decision was temporarily stayed pending the Tbilisi Regional Court's decision on the appeal.

### Related actions and campaigns

None

### Access to justice techniques

This case is quite interesting as it involves access to justice techniques used by both parties in the suit. For its

part, LSA was trying to prove that the plaintiff did not have sufficient interest in this case (despite the fact that he was exercising participatory rights in the name of “indigenous” interests) and that the court was wrong in its finding that the Kharagauli district was a special mountainous region.

The agency appealing the lower court decision could succeed in convincing the higher court to grant a stay of the lower court’s judgement pending resolution of the appeal.

### Case study analysis

The case study reflects a situation in which the greater long-term public interest is subsumed by the short-term (and possibly unfounded) interests of the local community. The main problem of the local population in the Kharagauli District concerning the establishment of the Borjomi-Kharagauli National Park, practically speaking, was the desire to have the right to use natural resources illegally (illegal harvesting of timber, hunting, use of pastures). Establishment and clear demarcation of the boundaries of the national park would prevent these actions of the local population. The existing economic and social conditions in Kharagauli District (as well as in other parts of Georgia) promote this kind of illegal demand.

### Comments of participants in the process

“This case is the most unusual case in my practice. Usually, I support citizens and local communities against public agencies, but in this situation I supported a public agency to protect a national park against members of the public. Access to justice in environmental matters may have its reverse side. The right to use the natural environment is a constitutional human right in Georgia along with the right to live in a healthy environment. Actually, in this case each party could use access to justice methods intended for environmental cases by the environmental and procedural legislation of Georgia. I think that in this situation, the interests of the national park were more important for the environment than the interests of part of the local community (farmers from the bordering villages). Probably if the local community had more accurate information about the creation and management of the national park, the national park would not have had problems with them.”

— Merab Barbakadze

“The WWF Georgia Country Office is directly involved in implementation of the German-Georgian ‘Borjomi-Kharagauli Open Programme,’ which is run by the German Bank KfW and which in turn is based on the December 21, 1998, framework agreement between the governments of Georgia and the Federal Republic of Germany on financial cooperation concerning Borjomi-Kharagauli National Park. Within this framework, the WWF Georgia Country Office is carrying out the responsibilities of the implementing unit. One of the objectives of the German-Georgian ‘Borjomi-Kharagauli Open Programme’ is to set the boundaries of the national park. That is why the WWF Georgia Country Office, in terms of the case study ‘National Park Without Land,’ could be considered both an interested and affected party.”

— Nugzar Zazanashvili (representing the WWF Georgia Country Office as an interested and affected party)

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# Georgia Case 2

## Vake Park Case

A citizen started a successful challenge of a permit for construction of a hotel in a protected park that was granted without informing the public or giving an opportunity for participation, but withdrew before final success as a result of harassment and intimidation.

### Relevant Aarhus provisions

- Articles 9(1), (2), (3) and (5)

### Key issues

- Review of public participation in decisions on specific activities
- NGO standing
- Financial barriers
- Injunctive relief
- Harassment and intimidation

### Case study details

**Cited case name:** Vake Park Case

### Parties involved

**Plaintiff:** George G.

**Plaintiff's representation:** Legal Society Association

**Defendants:** The Tbilisi Local Authority and Lazi XXI Ltd.

**Third-party intervenor:** Department of Monument Protection of the Ministry of Culture

### Background facts

One of the acute environmental problems facing Georgia in recent years is increased construction in parks,

gardens and their surroundings, despite a law that bans such activities. Lazi XXI Ltd. received permission to develop a part of Vake Park in 1996 by constructing a 16-storey hotel with supporting facilities and, in 1998, obtained the property deed. Permission to begin construction of the hotel was issued in November 1999, without providing information to the general public and citizens (or NGOs), giving them no chance to get involved in the decision-making process. The cost of the project was estimated at USD 15 million, though it was never discovered how Lazi XXI Ltd. intended to finance the project. In December 1999, the citizens of Tbilisi discovered these facts when construction began on the territory of the old Vake Park. Public protests did not resolve the situation.

### Procedural history

The Legal Society Association (LSA) launched an independent investigation which determined that, on the basis of the Law on Cultural Heritage, Vake Park was part of Georgia's cultural heritage. All activities that could negatively affect its condition should be banned in Vake Park and its surroundings. Furthermore, privatisation of parts of the cultural heritage of Georgia could be a violation of Georgian law, as well as violating certain rights defined by the Georgian Constitution, article 37(3, 5),<sup>14</sup> and the Law of Georgia on Environmental Protection, article 6(a, b, c, f).<sup>15</sup>

Under Chapter XLIV of the Civil Procedure Code (1999), only citizens were entitled to sue regarding administrative acts, and only in cases where the act directly affected their legal rights. Thus, NGOs did not have standing to challenge administrative acts, and it was therefore necessary to find a Vake District resident that could be recognised as a plaintiff with standing. A person (George G.) was proposed by Friends of the Earth Georgia.

LSA submitted the suit just before the Civil Procedural Code was superseded on January 1, 2000. The suit was submitted to the Regional Court of Tbilisi, but after the coming into force of the new General Administrative

Code and Administrative Procedural Code on January 1, 2000, the case was transferred to the District Court of Krtsanisi-Mtatsminda.

During the first preparatory court hearing, the problem of time limitation in which to bring the action was resolved. LSA proved that the plaintiff had no information about the issuance of the administrative act (the permits were never published), and had no chance to be involved in the decision-making process, a violation of his legal rights. According to article 361(2), chapter XLIV of the Civil Procedural Code of Georgia, time limitations for citizens' rights to appeal in court must be counted from the day when a citizen is informed about his right to appeal to court. Additionally, the citizen must be given the name and address of this court. Thus, the limitation of action should have been counted from the day the plaintiff received an official copy of the permits from the administrative agency in response to his letter of inquiry. The judge ruled in favour of the plaintiff on this point.

On the basis of the Procedural Legislation of 1999, the plaintiff had the right to ask the court to issue a permanent injunction invalidating the permit for reconstruction. However, if the plaintiff lost the case, the developer would require compensation for damages from the plaintiff. Therefore, the plaintiff would have chosen not to seek a permanent injunction. However, under the new Administrative Procedural Code, article 29, challenging an administrative act results in an automatic injunction suspending the act. This was applied in the present case.

### Final outcome

The judicial proceeding had great resonance with the general public. Due to the consequent media investigations and public reaction against the hotel construction, the local authority took effective action. The permit for construction was withdrawn and the senior architect (the public servant who issued the permit) of Tbilisi was dismissed. However, LSA wanted to overturn the privatisation act as well.

Success seemed to be at hand when an unforeseen complication developed. The plaintiff withdrew the suit, explaining that unknown persons had terrorised his family and demanded that he back down. The plaintiff refused to pursue the suit. Under article 22 of the new Administrative Procedural Code, any person (including an NGO) can challenge any administrative act, provided that it can prove a sufficient interest. That was almost impossible in this case, and LSA could therefore not initiate a new suit as an NGO. LSA hoped to find a new person to serve as a plaintiff with standing. However, the problem with time limitation remained.

### Case study analysis

The case was remarkable in that the rules for standing changed in the middle of the case. In 1999, NGOs were not

entitled to sue regarding administrative acts. Under Chapter XLIV of the old Civil Procedural Code, only citizens were entitled to sue regarding an administrative act, and only when the administrative act violated the citizen's legal rights. The plaintiff had to prove a sufficient interest in the case and that his rights had been violated. The plaintiff had to pay court costs and overcome the barrier of the time limitation for bringing an action. The court held that the public agency did not inform the plaintiff about his right to appeal the administrative acts to court.

NGOs also have problems with court costs. According to article 9(4) of the Administrative Procedural Code of Georgia, failure to pay court costs by a physical person does not hamper the consideration and decision of a case. NGOs have no such privilege and have to pay court costs (usually advance payment is required). LSA did not have funding for this case. It provided free legal service and Friends of the Earth Georgia paid the court costs.

Intimidation and harassment of the plaintiff were unfortunately successful in this case, and no action was taken to prevent this from happening or to punish the perpetrators.

The standing of the NGO to challenge the administrative acts in its own right, under the new Administrative Procedural Code of Georgia, has been greatly enhanced by the coming into force of the Aarhus Convention, since the NGO would not have to prove a sufficient interest to have standing.

### Comments of participants in the process

"We achieved some results in this case, including having the permit for construction withdrawn and ending construction activity. But we were not completely successful because the plaintiff dropped his suit. This outcome might never have happened if under our legislation, NGOs were entitled to sue regarding administrative acts without proof of sufficient interest. Once the Aarhus Convention is enforced, environmental NGOs will not have this kind of access to justice problem, because based on article 9 of the Aarhus Convention we will no longer need to prove sufficient interest."

— Merab Barbakadze, lawyer from the Legal Society Association.

"Vake Park is part of the cultural and environmental heritage of Georgia. In this regard, the value of the lawsuit against construction of the hotel cannot be underestimated. Despite the fact that the court never issued a final decision, the case put pressure on local authorities to take effective action against violations of law. The problem of finding a plaintiff with standing is the main issue for Georgian environmental NGOs. Too often we have been unable to initiate a

court case because we cannot prove a sufficient interest in the case. Finding citizens to serve as plaintiffs with standing creates lots of problems for them (because of problems with the community or blackmailing) as well as for us, as we are never sure how far he or she will go. With the Aarhus Convention having entered into force on October 31, 2001, the problem will hopefully be solved.”

—*Manana Kochladze*

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# Germany Case 1

## Waste Fuel Plant Case

The court's treatment of a local resident's suit seeking to enjoin the development of a waste-fuelled facility illustrates how the advantage of broad standing in environmental suits can be negated by narrowly construed interpretations of when injunctive relief should be granted.

### Relevant Aarhus provisions

- Article 9(4)

### Key issues

- Administrative and judicial review procedure
- Injunctive relief
- Duration of the proceedings
- Financial barriers ("loser pays" principle and the consequence of court costs to individual litigants)

### Case study details

**Cited case name:** Interim injunctive relief Claim: Mannheim Higher Administrative Court (VGH), ruling dated June 29, 1994 (File No 10 S 2510/93), *Neue Zeitschrift für Verwaltungsrecht* <NVwZ> 1995, 292 ff.

Legal Action: Mannheim Higher Administrative Court, judgement dated June 28, 1995 (File No 10 S 2509/93), *Neue Zeitschrift für Verwaltungsrecht* <NVwZ> 1996, 297 ff.

### Parties involved

**Plaintiffs:** Seven individuals living in Ulm and Neu-Ulm ("residents") within a radius of 1.5 to 3.5 kilometres from the planned location of a waste-fuelled power plant

**Defendants:** The State of Baden-Württemberg

**Third-party intervenor:** Zweckverband, an association of regional and local authorities that applied for the development permit and operated the waste-fuelled power plant

### Background facts

On February 28, 1992, an association of regional and local authorities (Zweckverband) belonging to the Alb-Donau District and the Municipality of Ulm submitted an application to the Regional Administration (Regierungsspreidung) for a development permit for a waste-fuelled power plant. The plant in question was a stationary installation for the combustion of waste not subject to compulsory monitoring. The plant was to be built in an industrial district of Ulm and would have had an annual total capacity of 111,000 tonnes.

Following the usual procedure for official announcements, the application and the planning documents were laid out for public inspection in the municipalities of Ulm and Neu-Ulm on May 29, 1992 and in the neighbouring communities of Blaustein, Erbach and Illerkirchberg on June 9-10, 1992. Residents then filed objections that were included on the agenda of public hearings on the matter and deliberated over during the hearing in Ulm from November 26 to December 5. Importantly, relevant procedural provisions stated that only objections, duly filed within the required period in the administrative procedure, could subsequently be asserted in court. As a general principle, any objections not filed within the required period could no longer be brought before the administrative courts (preclusion).

On September 22, 1993, the Regional Administration approved the permit for the waste-fuelled power plant, while simultaneously dismissing the objections that had been filed against the project. Furthermore, the administration declared the permit to be immediately enforceable. Such a decision — declaring an administrative act to be immediately enforceable — was an exception to normal

proceedings. Generally, actions and other appeals against administrative procedures, such as those entered by residents, served to halt enforcement of an administrative decision until found to be lawful by a court.

Hence, in this case, the recipient of the permit was able to begin construction of the plant despite residents filing legal objections.

### Procedural history

On October 21, 1993, the plaintiffs brought an action to annul the permit before the Mannheim Higher Administrative Court. In addition, residents also filed an application to reverse the “immediately enforceable” declaration and halt development of the site pending final judgement, pursuant to §80a paragraph 3 and § 80 paragraph 5 of the Code of Administrative Procedure [VwGO].<sup>16</sup>

### Subject of appeal

Residents asserted that the development permit infringed upon their procedural and substantive rights, particularly their right to physical safety, and contended that the air pollutants emitted by the plant posed a threat to their health. In the proceedings for interim injunctive relief, the plaintiffs also asserted that there was no prevailing interest in immediately enforcing the development permit, since the waste-fuelled power plant was unlawful.

### Final outcome

Neither the application for interim injunctive relief nor the action itself was successful. In addition, no appeals were lodged in this instance. Subject to VwGO §132 and 133, appeals against the judgements of the Higher Administrative Court are possible only via recourse to the Federal Administrative Court. Unlike resolutions of the administrative court, no objections may be filed against resolutions of the Higher Administrative Court in interim injunctive relief proceedings (VwGO §152 paragraph 1).

### Related actions and campaigns

None reported.

### Access to justice techniques

When contesting a development permit, a party does not have to appeal first to those authorities that have rendered a permit decree. Thus, as in this instance, a party may directly seek judicial review by the court of such decree. Additionally, in this case, residents also sought injunctive relief — suspending the declaration of immediate enforceability and halting development of the facility.

### Case study analysis

In this case, the following three issues, generally arising in environment-related actions by individuals or associa-

tions, are of particular relevance:<sup>17</sup>

- whether the legal standing or right to apply is limited to the asserted infringements of subjective rights;
- what the scope is of judicial control of substantial law (control breadth) within the context of examining justification; and
- what the intensity is of judicial control of substantial law — or “control depth” — within the context of examining justification.

The case study outlined here illustrates the interactions between the right to action, the scope of control and the density of control. Whereas the right to legal action, which is often problematic in environmental cases, does not hinder access in this concrete case, the scope of examination is confined to those rules that serve to protect third parties. On the other hand, as is often the case in environmental actions, the density of control is very high.

Moreover, the case is also instructive because, in addition to the action for annulment, it also involves interim injunctive relief proceedings. Even for this provisional ruling, the court undertook a summary examination with a high density of control. If the contested administrative act (e.g. the development permit of a plant) was found to be unlawful in a summary examination of this kind, within the context of interim injunctive relief, the court could have decreed that the administrative act should not have been enforced until a final decision on the main issue had been reached.

### Standing

German law primarily grants access to justice to those individuals who are able to assert that their individual rights (e.g. health, property, etc.) will be violated by an administrative decision. Typically, if the administrative decision concerns granting planning permission for an installation, all persons affected by the potential harmful effects of the plant will have such a right to legal action. For this reason, the right of action, as a general rule, does not pose a serious hurdle for access to justice for this group of potentially affected individuals.

In this instance, the right of action was found to be valid, both for the proceedings for interim injunctive relief, and for proceedings pertaining to the main issue. In each case, the plaintiffs contended that they were exposed to health risks as a result of air pollutants that would be emitted by the plant. In this respect, they referred to §8 paragraph 3, sentence 2, no. 3 of the Waste Avoidance and Management Act (Abfallgesetz) and §5 paragraph 1, no. 1 of the Federal Emission Control Act (BImSchG), which state that plants must be constructed in such a way that no harmful environmental impacts or other risks to the general public and neighbourhood are incurred. These provisions are recognised to protect third parties, since

they serve to avoid risks and since the “neighbourhood” is explicitly cited as the protected subject.

Given this, it was sufficient for the plaintiffs to assert that the plant posed a risk to their health and, in turn, substantiate their claims. Such an infringement of rights appeared plausible, since the plaintiffs resided within the area of impact of the plant (at a distance of 1.5 to 3.5 kilometres). Against this background, the Higher Administrative Court ruled by a narrow majority that the infringement of the plaintiffs’ rights due to the possible health risks “could not be excluded from every legal angle.”

### **Injunctive relief**

In the context of reversing an order of “immediate enforceability” as a means of interim injunctive relief, German courts generally examine two factors:

- The order for immediate enforceability must comply with the formal requirements (i.e. it must be made explicitly, in writing, and with adequate justification).
- From a substantive point of view, there must be a particular (public or private) interest in enforcement that outweighs the private interests of the possible affected parties (VwGO §80a paragraph 3 and §80 paragraph 5).

Focusing on the latter, the interest of the affected parties in suspending immediate enforcement generally outweighs enforcement of the decree if the underlying administrative decision is unlawful. Consequently, the success of the party seeking such injunctive relief turns on the party’s likelihood of success on the merits of its claim. In this, the action is likely to be successful only if the court finds that the rights of the plaintiff have been infringed in a manner likely to lead to the annulment of the administrative decision. (VwGO §113 paragraph 1, sentence 1).

In this instance, the residents’ application for injunctive relief was denied because the court found that the “interests” of the association of local and regional authorities (Zweckverband) outweighed the interests of the public represented by the nearby residents. In short, while finding that the relevant environmental statutes illustrated the possibility that environmental rights would be infringed and thus created a right of action, the development permit would not likely infringe upon those rights.

In making this determination, the court examined the relevant legal aspects at length, but confined its assertion of the facts to a rough examination. More specifically, regarding the scope of examination, the court confined itself only to the consideration of those provisions protecting third parties, failing to construe broadly potential infringement of residents’ (i.e. the public) interests by allowing development.

First, the court examined the existence of an effective statutory basis for the development permit and whether there were any procedural errors committed in issuing the order. Tellingly, procedural provisions designed to protect

the interests of the general public, as opposed to third parties, were disregarded. Moreover, the court held that any procedural errors that may have been committed were immaterial and would not have led to an infringement of the plaintiffs’ subjective rights had the intended purpose of the violated procedural provision been achieved through other means.

When examining the substantive lawfulness of the development permit, the court initially ascertained whether the provision in question was designed to protect a third party. It then conducted an extensive and detailed investigation into whether this provision to protect a third party had been violated, as a result of which the rights of the plaintiffs had been infringed. In this respect, the court consulted expert reports (some of which had been commissioned by the court itself, and others by the parties) and scrutinised the statements they contained, for example, with regard to measurement techniques and dispersal forecasts.

### *Duration of the proceedings*

Given the complexity of the matter and the size of the approved plant, the duration of the proceedings would not appear to be unusual, especially since the court was required to obtain and evaluate a large number of expert reports. Eight months elapsed between the submission of the applications for interim injunctive relief and the court’s decision, and another 20 months elapsed between the action being brought and the judgement.

It should be noted, however, that in most environmental cases, where the Higher Administrative Court does not have jurisdiction in the first instance, a Lower Administrative Court must first be consulted. Furthermore, the duration of the proceedings would have been considerably longer had there been an appeal to the Federal Administrative Court.

### *Costs of the proceedings*

Under German law, the costs of the proceedings are borne by the unsuccessful party (VwGO §154 paragraph 1), or if both parties are partially successful, the costs shall be shared accordingly (VwGO §159). If, however, there are multiple unsuccessful parties, court costs are generally divided equally, unless a different apportionment of costs is indicated by the particular circumstances (VwGO §159).

The costs of the proceedings are calculated according to the value of the claim in dispute. The importance of the matter is decisive when determining this value, and is determined at the discretion of the court<sup>18</sup> (§13 of the Court Costs Act [GKG]). Proceedings relating to interim injunctive relief are independent from the proceedings pertaining to the main issue. As a general rule, for proceedings relating to interim injunctive relief in accordance with §20 paragraph 3 of the Court Costs Act (GKG), the amount in dispute is calculated as a fraction of the value of the proceedings pertaining to the main issue (§20 paragraph 3

of the Court Costs Act [GKG]).

While not applicable in this case, in the event of an appeal to the Federal Administrative Court, higher court costs and legal fees would have been incurred. Additional costs are also generated if an appeal before the administrative authorities is implemented prior to bringing action.

In the instant case, the amount in dispute was set at DEM 70,000. Consequently, the cost was DEM 3,100 for the proceedings pertaining to the main issue and the proceedings relating to interim injunctive relief.<sup>19</sup> In addition to the court costs for interim injunctive relief and the action for annulment, lawyers' fees were also incurred, plus any compensation for witnesses and experts, where applicable.

As evident in this case, the costs of complex environmental cases, particularly those involving large-scale projects, are often a de facto obstacle to access to justice. Given this and in light of German law, legal aid assistance provides a possible solution. A general requirement for the granting of legal aid is that the lawsuit must have a reasonable prospect of success and must not be deemed wanton

(VwGO §166 and §114 of the Code of Civil Procedure [ZPO]). Furthermore, the parties must be needy. In the case of natural persons, this is determined according to their income and available assets (ZPO §114 and §115). Finally, domestic legal persons or organisations with the capacity of being party to legal proceedings may apply for legal aid if neither they nor parties financially involved in the lawsuit are able to bear the costs, and failure to pursue or defend the matter in court would contravene the public interest (ZPO §116, sentence 1, no. 2).

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# Germany Case 2

## Experts' Documents Case

A recognised nature conservation association participating in a development permit procedure following the amendment of planning documents, whose request for access to “relevant expert reports” was not fulfilled, sought to annul the issued development permit on the grounds that its participatory rights were infringed and such infringement could not be remedied in a supplementary hearing.

### Relevant Aarhus provisions

- Articles 9(1) and (2)

### Key issues

- Review of denial of access to information
- Review of public participation in decisions on specific activities

### Case study details

**Cited case name:** Development permit section 2.5: Hearing relating to the construction of a train track extension between Erfurt and Leipzig/Halle

Ruling by the Federal Administrative Court: Dated November 12, 1997 (File No 11 A 49/96), Federal Administrative Court ruling (BVerwGE) 105, 348 ff.; Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1998, 395 ff.

### Parties involved

**Plaintiff:** NABU Landesverband Sachsen-Anhalt, a recognised nature conservation association under federal law (§29 paragraph 2 of the Federal Nature Conservation Act [BNatSchG]).

**Defendant:** The Federal Republic of Germany, represented by the Federal Railways Authority (FRA)

In this case, the nature conservation association claimed the infringement of its own rights, specifically its right to participate in development permit procedures (§29 of the Federal Nature Conservation Act [BNatSchG]). As such, this was not a legal action taken by an association to assert substantive environmental interests, but a so-called altruistic legal action by an association.<sup>20</sup>

### Background facts

On May 11, 1995, the regional administration in Halle initiated plans to conduct a hearing to discuss the possible issuance of a development permit for the construction of a train track extension from Erfurt to Leipzig/Halle. In a letter dated June 19, 1995, the regional administration invited NABU to participate in the proceedings and sent the relevant planning documents indicating the project's potential effects on nature conservation interests to the organisation.

Subsequently, NABU raised a number of objections to the development permit and requested access to other documents in a letter dated August 14, 1995.

At the public hearing on November 8, 1995, NABU once again explicitly requested access to various documents, including, in particular, an expert report by the planning office “O” referring to a survey of natural features of the surrounding countryside. NABU also reiterated its objections to the project that were stated in the August 14 letter.

A development permit was granted on June 25, 1996. In it, the Federal Railways Authority rejected NABU's application to view the files. The development permit also stated that the project planners, in order to counteract the objections lodged, had made amendments to the planning documents laid out for public inspection. The amendments concern, inter alia, the accompanying landscape management plans, including replacing 18 of a total 100 pages in part 1 of the accompanying landscape management plan, 169 of a total 214 pages in part 2, and 49 of a total 68 pages in part 3, annex E. The total land affected by

the landscape management measures was reduced from 1,036,5471 to 1,032,6922 hectares. In all, the amendments affected more than 50 percent of the total land area. Finally, rather than completely transforming arable land into extensive grassland, under the amendments, part of the arable land was now to be placed under groundwater protection-oriented management.

According to the development permit, the amended planning documents were sent to the relevant authorities and private individuals who would be affected by the amendments, either for the first time or more severely than before. The document indicated that opinions had been requested and that the opinions received had been addressed. No new date for public discussion was set according to the development permit.

### Procedural history

NABU brought legal action against the development permit at the Federal Administrative Court (the court of first instance according to §3 paragraph 1 of the Act on Acceleration of Traffic Infrastructure Planning [VerkPBG]) on September 4, 1996. In the complaint, NABU sought to annul the development permit of June 26, 1996 and, secondly, asserted that the development permit was unlawful and thus not enforceable.<sup>21</sup>

NABU based their claims on the contention that the development permit was unlawful because it infringed its participatory rights in accordance with §29 of the Federal Nature Conservation Act (BNatSchG). In particular, §29 of the Federal Nature Conservation Act (BNatSchG) states that recognised nature conservation associations must be given an opportunity to express their views and have access to the relevant expert reports in development permit procedures for projects which involve impairment of nature and landscapes.

In support of its claim, NABU argued that the defendant failed to notify the plaintiff of the amendments to the accompanying landscape management plans and failed to give the plaintiff an opportunity to voice its opinions, even though the major and qualitative amendments to the planning documents would have necessitated its renewed participation. In particular, key parts of the accompanying landscape management plan had been altered, with implications for other elements of the development permit. The modified plan's value to nature conservation was substantially inferior to the original version, it claimed, since its compensatory effects were much lower. The plaintiff further alleged that a number of compensatory and replacement measures had been downgraded to such an extent that there was no longer any significant beneficial effect for the ecosystem. The plaintiff would have rejected these subsequent amendments had it been aware of them and given the opportunity to do so.

It was further alleged that NABU had not been granted access to all relevant expert reports as requested in its

appeal dated August 14, 1995. All the documents in question, the plaintiff contended, were “relevant expert reports” as per the definition of §29 paragraph 1, sentence 1 of the Federal Nature Conservation Act [BNatSchG], because they were important for an assessment of nature and landscape conservation. Had NABU been aware of the required documents, it argued, it would have extended its opinion to include other aspects addressed in the documents.

NABU contended that its lack of participation could not be remedied by a supplement to the development permit or supplementary proceedings. Therefore, the permit was unlawful, the group argued.

### Final outcome

The plaintiff's main charge — that the development permit should be annulled due to defects in the proceedings — was rejected. However, the subsidiary charge — that the development permit was unlawful and not enforceable due to the procedural infringement — was affirmed.

According to the court, denial of NABU's participatory rights was a sufficient infraction to render the development order illegal and not enforceable. In this, the court ruled that NABU's participatory rights had been infringed in two respects:

- 1) The railway authority infringed upon NABU's participatory rights by denying it a further opportunity to voice its opinions once the development permits had been amended, despite being obliged to do so (§29 paragraph 1, sentence 1, no. 4 of the Federal Nature Conservation Act [BNatSchG]). As a general principle, a single hearing would suffice to accommodate a nature conservation association's participatory rights, since nature conservation associations are not “general companions” of the development permit procedure. Nevertheless, the participatory rights of nature conservation associations are not mere formalities. Instead, there is a need for a “substantial” hearing. On the basis of this, it may become necessary to give nature conservation associations a second opportunity to voice their opinions, despite having already been duly consulted.

Whether a second opportunity to offer an opinion is required turns on the overall purpose of a particular party's participation. In matters such as the instant case, nature conservation associations serve a valuable role by supporting authorities with expert knowledge and by providing a check ensuring that nature and landscape conservation interests are considered in proceedings. Consequently, this “participation of expert knowledge” necessitates renewed participation if the permit itself is altered in a manner that affects nature conservation interests.<sup>22</sup> Moreover, a second hearing is required if the nature conservation authorities are to be given another opportunity to voice their opinions because the modified development permit affects their scope of action, either for the first time, or to a greater extent.



In this case, the court felt that these requirements for the repeated participation of the plaintiff had been met. Additional nature conservation issues were raised as a result of the amendments to the envisaged land use. In quantitative terms, the changes affected about 50 percent of the land area. In qualitative terms, the changes affected the overall concept of the compensatory measures. Whereas the desired intent was originally to dispense largely with agriculture in favour of grassland, under the amended development permits formerly arable land would continue to be used to an even greater extent. In the face of such far-reaching amendments, the defendant would not be able to determine, without once again consulting the plaintiff, whether the altered development permit still complied with nature conservation regulations. Moreover, the defendant itself evidently assumed that the interests of third parties and other authorities would be more severely affected by the amended development permits, because contrary to its comments in the development permit, it did in fact consult the responsible nature conservation authorities once again. Consequently, it would also have been obliged to consult the plaintiff once again, and was wrong not to do so.

(2) The court also ruled that the railway authority infringed upon NABU's participatory rights by failing to grant the plaintiffs access to the expert report by office "O" (§29 paragraph 1, no. 4 of the Federal Nature Conservation Act [BNatSchG]). Although §29 paragraph 1 of the Federal Nature Conservation Act (BNatSchG) does not grant comprehensive rights of free access to all the files in the development permit procedure, it does grant the special additional right of access to "relevant expert reports." This not only includes reports by experts formally consulted under the Law on Administrative Procedures (VwVfG), but also expert statements by third parties, albeit only to the extent that such reports refer to "relevant" issues.

In this case, "relevant" reports are those that "refer directly to nature conservation legislation or landscape management interests, but not to other issues on which the nature conservation associations would not be expected to give an opinion." Accordingly, the Federal Railway Authority should have granted NABU access to the expert

report by the office "O" that referred to a survey of the corridor of countryside along the new section of track and thus directly addressed conservation matters within the text of the report.

## Related actions and campaigns

None reported

## Access to justice techniques

Plaintiffs used the courts to challenge a decision based on a substantially amended proposal, and in particular attacked the failure of the authorities to include the NGO in new proceedings and to provide necessary expert reports.

## Case study analysis

The court's ruling underscores the importance of incorporating rights to consultation within the body of environmental statutes. In this matter, the court needed to find procedural violations of the Law on Administrative Procedures (VwVfG) given that §29 of the Federal Nature Conservation Act (BNatSchG), expressly provides a "qualified right of consultation" thus taking precedence over any related administrative law provisions. Thus, the effect was not merely to annul the order but to make it illegal on its face. As held by the court, the legislature has "subjectified" the public interest in nature conservation and landscape management in order to facilitate a more widespread involvement in the development permit procedure.

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# Germany Case 3

## Windmill Case

A broad right to action directly conveyed by an environmental statute allowed a nature conservation association to bring suit against developers solely on the basis of conservation interests and without the need to establish that individual rights had been infringed upon.

### Relevant Aarhus provision

- Article 9(2)

### Key issues

- NGO standing
- Judicial review

### Case study details

**Cited case name:** Development permit: Potsdam Administrative Court, judgement dated August 7, 1997 (File No 1 K 3417/95), NuR 1998, 675 ff.

### Parties involved

**Plaintiff:** A recognised nature conservation association (“association”) (§63 paragraph 1 of the Brandenburg Nature Conservation Act [BbgNatSchG] in conjunction with §29 paragraph 2 of the Federal Nature Conservation Act [BNatSchG])

**Plaintiff’s representation:** Attorney Jurgen Schindler-Clausner

**Defendant:** The Ministry for the Environment, Nature Conservation and Regional Planning (“Ministry”), the authority that issued the licence under landscape protection law (§19 paragraph 2 of the Brandenburg Nature Conservation Act [BbgNatSchG])

**Third-party intervenor:** Private investor, seeking to exclude a property for a wind power facility from protected conservation area

### Background facts

A private investor initiated plans to construct and operate a wind power station in Westhavelland, a conservation area placed under temporary protection amid proceedings to grant permanent protection status. Given that permanent protective status had yet to be conferred, the investor applied to exempt the site from the conservation area.<sup>23</sup>

The lower countryside authority forwarded the investor’s application to the Ministry for the Environment, Nature Conservation and Regional Planning, stating that in its opinion, the application should be refused. The Ministry also consulted the regional offices of the recognised nature conservation associations, which likewise rejected the project at this site.

Despite this, the Ministry approved the project in an administrative decision dated July 12, 1995. In approving the project, the Ministry relied extensively on expert reports submitted by the investor that stated that the risk to birds from a wind power station were minimal. In addition, according to the reports, disfiguration of the landscape would also be minimal and, though large in scale, the facility would not obstruct views within public access areas of the tract.

The Ministry also based its decision on the assumption that the investor’s application for exemption would be interpreted as a licence and, consequently, would be subject to use limitations in accordance with §19 paragraph 2 of the Brandenburg Nature Conservation Act (BbgNatSchG).

### Procedural history

The plaintiff brought legal action against the development permit of the wind power station at the Potsdam Administrative Court. The plaintiff asserted, inter alia, that

the defendant had failed to satisfy the principle of official investigation, and in particular, had neglected to examine satisfactorily the impacts of the wind power station on the site's function as a feeding, resting and sleeping area for numerous species of birds.

## Final outcome

The court deemed that the association had standing to bring its suit and, subsequently, the association succeeded on the merits of its claim. The association's suit resulted in the annulment of the Ministry's administrative decision approving the wind power station.

## Access to justice techniques

The association initiated a judicial review of the Ministry's decision. From documents available on the case, it is not possible to deduce whether preliminary proceedings were also held. However, it is likely, given that it is generally necessary to lodge an appeal for administrative review (§68ff. of the Code of Administrative Procedure [VwGO]) before bringing a suit for annulment.

## Related actions and campaigns

None

## Case study analysis

The association's right of action derived from a provision under the land law expressly addressing an association's standing rights (§65 of the Brandenburg Nature Conservation Act [BbgNatSchG]). Notable within most of the *Lander*, including Brandenburg, is that an association has a right to take action not merely upon demonstrating individual harm, but more broadly in conjunction with affected conservation interests. Accordingly, a nature conservation association that is recognised in Brandenburg in accordance with §29 of the Federal Nature Conservation Act [BNatSchG] may bring legal actions in administrative courts challenging decisions by the land administration without having to establish that its individual interests or rights have been infringed upon.<sup>24</sup>

More specifically, in order for a recognised association to bring suit in the absence of demonstrated individual harm, the following elements must be established:

- The association must assert that, as a result of the adoption, rejection or omission of an administrative act, the provisions of the Federal Nature Conservation Act (BNatSchG), the Brandenburg Nature Conservation Act (BbgNatSchG) or other legal provisions adopted on the basis of these acts have been violated.
- The administrative act or the omission thereof must involve subject matter related to the purposes of the

association. (§63 paragraph 2, no. 1 or 2 of the Brandenburg Nature Conservation Act [BbgNatSchG] or §29 paragraph 1, no. 3 or 4 of the Federal Nature Conservation Act).

- The duties and goals of the association as set out in its articles of association are affected by the administrative act or omission.
- The association has exercised its participatory rights in accordance with the Federal Nature Conservation Act (BNatSchG) or the Brandenburg Nature Conservation Act (BbgNatSchG), or has not been given an opportunity to express its views.

In terms of improved access to justice, this framework is ideal for allowing NGOs additional opportunities for challenging administrative decisions with clear environmental and community-wide consequences. In the instant matter, had the association been required to demonstrate harm to individual rights, it may not have been able to challenge the Ministry's decision. Like many decisions with environmental impacts, the only parties with apparent rights of standing were the government and the private developer. By expanding the traditional basis for standing through the above framework, however, the association, and others like it, are given the means to bring suit, and as a result, a critical, broader basis for bringing environmental suits.

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# Germany Case 4

## Nature Reserve Case

A nature conservation association was denied non-privileged and relevant expert documents in the course of a public hearing on the building of a train track.

### Relevant Aarhus provisions

Articles 9(2) and (4)

### Key issues

- NGO standing
- Interim injunctive relief
- Review of public participation in the decisions on specific activities

### Case study details

**Cited case name:** Nature Reserve Markische Schweiz

### Parties involved

**Plaintiff:** Naturschutzbund (NABU), a recognised conservation group

**Defendants:** Ministry of Environment, Nature Protection and Regional Planning, the State of Brandenburg and a private investor

### Background facts

In 1994, a private investor brought a petition before the Regional Planning Board of the State of Brandenburg to exempt a protected area from the Markische Schweiz nature reserve. The investor sought to build 46 single-family and semi-detached homes for commercial use.

The public administration of the State of Brandenburg granted the investor a permit to develop the land on the

condition that he reduce the size of his project. The investor then developed plans for 29 home units and the public administration approved the project at a second hearing, exempting the necessary land from the nature reserve.

NABU, a recognised regional conservation group, participated in the initial proceedings as a “necessary” party. At these proceedings, NABU opposed the 46-unit development plan. However, it was not called upon to participate in the second proceeding, where the 29-unit plan was presented and approved.

During the same year, NABU filed a complaint with the Administrative Court of Frankfurt/Oder (State of Brandenburg) asserting that the proceeding and subsequent approval were not valid, given the group’s absence as a “necessary” party.

### Procedural history

In filing its complaint, NABU requested interim injunctive relief suspending development until resolution of the lawsuit. Relief was granted and construction was halted for the duration of proceedings — a period of three years.

In 1997, the Administrative Court ruled partly in favour of NABU, holding that public authorities erred in not allowing NABU to participate in the second proceeding, since the revised plan represented a substantial change that required all necessary parties to have been represented at the proceedings.

In Germany, however, such a ruling seldom cancels the relevant decisions. In the instant matter, the authorities’ decision was only modified. The court ruled that a 25-unit plan, rather than one of 29 units, was proper under existing regulations.

NABU appealed this decision to the Higher Administrative Court of the State of Brandenburg.

### Final outcome

In 1998, the Appeals Court reversed the lower court’s decision, holding that the licence granted by the authorities

was unlawful and the development plan did not qualify the land as exempt from protected status.<sup>25</sup> The investor's development plan was denied.

### Related actions and campaigns

The case involved the local public through newspaper coverage and public meetings.

### Access to justice techniques

In seeking judicial review of the Brandenburg authority's decision, NABU exercised a right of standing guaranteed to associations. To this date, this right of standing exists in 13 of Germany's 16 *Länder* and extends only to matters at the *Länder* level.<sup>26</sup>

### Case study analysis

Ensuring participation remains difficult. In the instant matter, the fact that the court did not render the authority's decision void in the absence of NABU — a necessary party — signals that there are still limits to using the courts to ensure public participation.

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# Germany Case 5

## Baltic Sea Motorway Case

In filing a judicial complaint against a massive government highway project, an environmental NGO obtained an order temporarily halting construction and established a judicial precedent that will aid in resolving environmental cases in the future.

### Relevant Aarhus provisions

- Articles 9(2) and (4)

### Key issues

- NGO standing
- Interim injunctive relief
- Review of public participation in decisions on specific activities
- Financial barriers

### Case study details

**Cited case name:** Baltic Sea Motorway A 20

### Parties involved

**Plaintiff:** Bund für Umwelt und Naturschutz (BUND), a recognised conservation group

**Defendant:** State Office for Road Construction and Traffic, State of Schleswig-Holstein

**Third-party intervenor (for the plaintiff):** Naturschutzbund (NABU)<sup>27</sup>

### Background facts

Government officials sought to begin an expansion project along a sub-section of the Motorway A 20, the

Baltic Sea Motorway, in the German State of Schleswig-Holstein. Part of the German Unification traffic development programme, the project was a special priority of the federal government. However, the proposed route also included a 6.3-metre section of the Wakenitz Valley reserve, an area that qualified under EU law as a protected flora and fauna habitat.

After an attempt failed to settle differences between the government and environmental NGOs, the German environmental NGO, BUND, filed a lawsuit seeking to enjoin the government from continuing with the project.

### Procedural history

BUND filed a complaint before the Federal Administrative Court in Berlin asserting that procedural violations and practical considerations rendered the project void.<sup>28</sup> In addition, BUND requested interim injunctive relief, halting construction during the duration of summary proceedings.

In asserting that procedural violations had occurred, BUND stated that officials issued important public documents either late or with limited accessibility. In addition, the planning authority denied an inspection of substantial documents during hearing procedures, and modified documents several times without allowing NGO participants to review the changes or take part in subsequent discussions.

In questioning the reasonableness of the project and planning process, BUND asserted that officials had not demonstrated a sufficient need for the project. Moreover, the road extension as planned ignored less intrusive alternate routes and made no provisions for reducing noise pollution or ensuring efficient building and maintenance costs.

On the matter of injunctive relief, in March 1997 the court ruled in favour of BUND. In its ruling, a key issue was that the area qualified for protected status under European law (EEC Directive on the Protection of Birds and Flora and Fauna Habitat). As held by the court, officials could not adequately ensure that, if construction were to begin, the area would not be damaged prior to an official designation

of the area as flora and fauna habitat. Moreover, if construction were allowed, BUND's legal claims would immediately become moot. BUND did not have to post a bond nor did it face the possibility of damages if it lost on its claim. The injunction remained in place until the court issued a final decision on the merits.

### Final outcome

In May 1998, the Federal Administrative Court lifted the injunction and, addressing the merits of the case, ruled in favour of the government. In making its decision, the court had to clarify whether the area in question, which was not yet officially protected under EU law but nevertheless qualified for such protection, should be excluded from the project. Second, the court had to determine whether the EEC Directive on habitat had direct effect or not.

The court ruling suggested a compromise, stating that, while EU law was not violated and the expansion project could continue, this was justified only because a tunnel could be dug under the qualifying area.

With very limited options for an appeal, BUND requested a review of the decision by the Federal Constitutional Court in Karlsruhe. The court did not grant a review, citing that no constitutional rights were violated.

### Related actions and campaigns

In preparing for the lawsuit, BUND enlisted the services of many volunteers and coordinated with other NGOs. The federal authority in Schleswig-Holstein strongly promoted construction of the motorway and conducted a large media and public relations campaign.

### Access to justice techniques

Judicial review by a federal administrative court was the only recourse available to BUND. As an environmental association, however, BUND's standing to bring a legal claim was limited to making allegations of violations of environmental law.

Under German law, the condition of granting NGOs broad standing for undifferentiated harm limits the claims that they can make. If an environmental association bases any or all of a claim on non-environmental matters, the judge is instructed to ignore those grounds.

### Case study analysis

In the instant matter, BUND's claim against the project hinged equally on economic, noise and logistic considerations. However, the court appraised the claim solely on the basis of environmental law considerations. Seeing that EU law did not yet fully apply and that a tunnel allowed for less invasive expansion, the claim was defeated.

Despite ultimately failing on the merits, the case demonstrates the importance of filing judicial complaints in response to questionable government procedures and actions. That BUND successfully halted construction of a federal highway project (without risk of financial liability) illustrates the power of using the courts to secure citizens' rights. The strategy used in this case now serves as a model for other citizens and NGOs in limiting questionable highway and construction projects.

Further, motivated by BUND's environmental claims, the court created a legal precedent for handling potential flora and fauna habitat areas in Germany that strengthens natural resource protection.

The case also shows that limitations on appeals reduce citizens' access to justice. A substantial limitation on the effectiveness of this suit was that the administrative court ruling could not be appealed. Under German law, federal administrative court decisions are final. Such absolute authority given to one court directly contravenes the spirit of the Aarhus Convention by limiting citizens' ability to have the merits of their legal claims fully appraised through interpretation and evaluation of the interpretation. This formula is a cornerstone for effective and complete access to justice.

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# Germany Case 6

## Elbe Case

Avoiding public participation in a proceeding by officials underscores the importance of citizen suits, injunctive relief and the right to appeal all judicial decisions.

### Relevant Aarhus provisions

- Articles 9(2) and (4)

### Key issues

- Standing
- Interim injunctive relief
- Review of public participation in decisions on specific activities

### Case study details

**Cited case name:** Construction site on the Elbe River

### Parties involved

**Plaintiffs:** Bund für Umwelt und Naturschutz (BUND), a recognised conservation group; Sachsen-Anhalt, a state group

**Defendant:** German Federal Republic, Administration of Water and Navigation

### Background facts

In the instant matter, federal officials proposed and approved a federal construction project on a site on the Elbe River. Describing the project as maintenance of a federal waterway, the federal government contended that official proceedings involving the public were not necessary.<sup>29</sup> Accordingly, citizen groups, including BUND, were

not informed of the project nor did they participate in any dialogue with government officials before construction.

Given this, German law holds that BUND and other members of the public do not have standing to challenge the project because they were not participants in a public hearing.

### Procedural history

BUND filed a complaint before the Federal Administrative Court in Berlin asserting that because the project involved a federal waterway (Elbe), an approval process involving the public was required. Thus, the approval process chosen was invalid and the decision to begin construction void. In this, BUND also requested interim injunctive relief, halting construction throughout the duration of a summary procedure.

On October 19, 2000, BUND's request for injunctive relief was submitted to the court.

### Final outcome

On October 27, 2000, the court rejected BUND's request for relief, affirming the classification of the construction as a maintenance project and upholding the related proceedings. According to the court, the approval process was not chosen with the intent to avoid citizen participation and thus BUND's claims were without merit. The administrative court's decision could not be appealed. The construction project was approved.

However, the court's awarding of injunctive relief, halting construction of the road, made a considerable impression on the public. The signal was that it was possible for environmental interests to win in court against infrastructure expansion efforts.

### Related actions and campaigns

The case involved the local public via newspapers and public meetings.



## Access to justice techniques

The only legal strategy available to BUND was to seek judicial review of the decision by a federal administrative court. In this, BUND had to assert that the approval process was chosen in order to avoid public participation and therefore deprive BUND the necessary standing to bring suit.

## Case study analysis

The instant case illustrates a typical technique used by governments and private parties to avoid public participation in decision-making. Generally, a private investor interested in developing or using a site will approach the government to discuss the scope and details of the operation. Under German law, such a dialogue is guided by the “principle of cooperation.” Too often, however, the investor is seeking an expedited approval process and the government acquiesces by initiating a licensing proceeding that limits or eliminates environmental impact assessments and public participation. Further, the agreed scope of the project will often be smaller on paper than originally proposed but, in the end, is easily amended in order to increase the size of the project. All of this occurs beyond the reach of citizen involvement and control.

Most problematic is the fact that the public, having not participated in the proceedings, cannot file a lawsuit to halt the project. Under German law, public participation in a proceeding is a prerequisite to bringing a legal claim regarding the matter. If, however, a citizen or association can demonstrate that the format of the proceedings was chosen with the purpose of eliminating public participation, a lawsuit on the matter will be upheld.<sup>30</sup>

Filing a complaint is a critical tactic in ensuring more consistent public participation. The instant matter illustrates the importance of filing a complaint in court to

challenge administrative proceedings designed to eliminate public participation. As is evident in this case, the results will surely not always be successful, but citizens must continue to pressure officials to protect participatory rights. Citizens must not tolerate false administrative procedures or put up with the avoidance of public participation.

Judicial examination of the nature of the project at issue and the government’s rationale for proceeding as it did is the best means of ensuring public participation.

A substantial limitation on the effectiveness of this suit was that the administrative court ruling could not be appealed (see also Germany Case 5).

The avoidance techniques illustrated by this case underscore a continuing problem in German jurisprudence. Effective legal mechanisms, such as notice and comment requirements, need to be developed and consistently applied by officials. They must be monitored by the public and enforced by the judiciary. That a project can escape public scrutiny and involvement simply by giving it a different label signals the need for reform.

Continued scrutiny in the courts is one of the most effective means of accomplishing this.

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# Hungary Case 1

## The Balaton Highway Case

A narrow interpretation of standing for environmental NGOs prevented them from seeking judicial review of actions and decisions with clear environmental impacts.

### Relevant Aarhus provisions

- Articles 9(2) and (4)

### Key issues

- NGO standing (sufficient interest)
- Publicly accessible decision
- Financial barriers
- Review of public participation in decision-making

### Case study details

**Cited case name:** Somogy Nature Conservation Organisation v. Ministry of Traffic, Telecommunication and Water Management of Hungary

### Parties involved

**Plaintiff:** Somogy Nature Conservation Organisation (Somogy County, Hungary), environmental NGO and affiliate of the Hungarian Birdwatcher Society

**Plaintiff's representation:** Environmental Management and Law Association (EMLA)

**Defendant:** Ministry of Traffic, Telecommunication and Water Management of Hungary

**Third-party intervenor (for the defendant):** State Highway Management Company<sup>31</sup>

### Background facts

The Hungarian government had long planned to build a highway connection between Budapest and the Adriatic Sea, along the southern shore of Lake Balaton. Throughout the 1990s, several government resolutions were passed and proposals made towards realising this link. Until that time, the highway, known as the M7, extended only partially from Lake Balaton.

In 1993, the State Highway Management Company (SHMC) petitioned the Traffic Inspectorate General for a permit to lengthen the M7 highway.

SHMC proposed two alternate plans for the expansion of the M7. The first plan (called “A” after the Hungarian word *alagút*, meaning “tunnel”) bypassed villages near the lake through a tunnel. The advantage of this plan was the conservation of wildlife and natural habitats, while the disadvantage was concentrated pollution at the ends of the tunnel in inhabited areas. The second plan (called “V” after the Hungarian word *volgyhid*, meaning “viaduct”) would cut through a 100-hectare forest. Its advantages were less pollution for inhabited areas, while the obvious disadvantage was the clear-cutting of a large area of woodland.

In public hearings on the matter, the mayors and village councils of neighbouring communities supported the “V” version, while the plaintiff, the Somogy Nature Conservation Organisation (SNC), favoured the “A” version, or at least opposed the “V” version.

In 1996, the Inspectorate issued a permit allowing the expansion of the M7 to move forward with the “V” version.

### Procedural history

SNC then filed a complaint before the Ministry of Transport, Telecommunication and Water Management (Ministry), the superior administrative agency on such matters, seeking administrative review of the Inspectorate’s decision to issue a permit.

The Ministry rejected SNC’s claim, stating that the group lacked sufficient standing. The Ministry’s ruling

turned on two points. First of all, there was no need to involve an environmental NGO, since the state environmental and nature conservation agencies took part in the permitting process.

Second, the matter was not an “environmental” case as defined by the Hungarian Environmental Protection Act; therefore no NGO standing was conferred.

Subsequently, SNC filed a second complaint, this time before the Capital Court of Budapest, seeking judicial review of the Inspectorate’s decision. In similar form, the Capital Court dismissed the case, holding that SNC lacked standing in such matters.

SNC appealed to the Supreme Court in 1997 and again in 2000, seeking an extraordinary judicial remedy. On both occasions, the court dismissed SNC’s claim for lack of standing. In the latter decision, the Supreme Court detailed its standard for granting standing to environmental NGOs.

## Final outcome

The Supreme Court’s decision precluded an environmental NGO from challenging government decisions in matters not explicitly involving Hungarian environmental laws. Concurrent with this decision, several similar high-level judicial decisions on standing were also issued, each systematically refusing to grant NGOs standing in cases with environmental relevance, but not directly concerning environmental impact assessments (EIAs) or environmental audits.<sup>32</sup> Thus, proposed activities with clear environmental impacts, though governed by other bodies of law, were beyond the reach of those groups most qualified to challenge government decisions affecting the environment.

Concerning the highway, the plan to build the original “V” version was not implemented, and a new alternative requiring less deforestation and costing less was being considered.

## Related actions and campaigns

SNC filed a complaint with the Chief Public Prosecutor, requesting that action should be taken against the construction permit. The prosecutor’s office refused the application, referring to the Act on Prosecutors, which prevents prosecutors from taking action while a lawsuit is proceeding.

SNC also conducted a mass media campaign to raise awareness of the environmental problems involved in extending the M7 highway.

## Access to justice techniques

In challenging the Inspectorate’s decision, SNC’s only recourse was to file an action before an administrative or capital court, pursuant to Chapter 20 of the Hungarian Civil Procedural Code.

In addition, SNC cited a lower countryside town court

decision in asserting that standing had been established for NGOs in such cases.

## Case study analysis

The Supreme Court’s ruling took a narrow view of what constitutes environmental matters that trigger standing for NGOs. Hungary’s guiding provision on standing, article 3 paragraph 4 of the Act on Administrative Procedure, requires that a party must have a right or *legitimate interest* affected by the case. Referring to this law, the Court held that environmental NGOs have a legitimate interest only in those matters directly involving “environmental” statutes, “environmental” impact assessments, or “environmental” audits.<sup>33</sup> In this, the Court hinged standing on terminology rather than on impact.

The instant matter illustrates the fact that a host of matters, while not labelled “environmental” as such, clearly have environmental consequences. The “legitimate interest” of NGOs that the Court claimed to uphold should be no different than between matters labelled as environmental and those simply having environmental consequences.

## Financial barriers

A positive aspect of the case is that all the proceedings were almost free of charge for the plaintiff, since — according to article 5 of Act no. 93 of 1990 on Administrative Fees — NGOs are exempt from administrative or court fees.

A second positive element was that the legal services provided to SNC were provided free of charge by EMLA, an environmental public interest legal organisation. Their model of *pro bono* legal services should be supported and financed throughout Eastern Europe.

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# Hungary Case 2

## Metal Plant Case

The denial of a local resident's access to environmental information on a metal waste facility on the grounds that the individual did not have standing in any lawsuits involving the facility was held by a court to be illegal.

### Relevant Aarhus provision

- Article 9(1)

### Key issues

- Judicial review of denial of access to information
- Standing
- Financial barriers
- Judicial interpretation and precedent

### Case study details

**Cited case name:** Kovari v. Environmental Inspectorate of Northern Hungary

### Parties involved

**Plaintiff:** Istvan Kovari, resident of Sajokeresztur

**Plaintiff's representation:** Environmental Management and Law Association (EMLA)

**Defendant:** Environmental Inspectorate of Northern Hungary

### Background facts

In 2000, Istvan Kovari, in his private capacity, filed a request before the Environmental Inspectorate of Northern Hungary to access environmental information related to air

and noise emission data of BEM Co., a metal waste reprocessing plant. The Inspectorate refused the request, stating that Kovari lacked standing in any of the cases related to BEM Co.'s emissions.

### Procedural history

In 2001, Kovari filed a complaint before the local City Court of Miskolc, seeking a court order to require the Inspectorate to provide the information.

Kovari based his claim on Act no. 63 of 1992 (Freedom of Information of Public Interest), which allows any person acting in the public interest to seek a court order for the provision of information. Importantly, the burden rests with the holder of the information to prove why a refusal of information is lawful or well founded.

At the heart of his complaint was the argument that access to information should not be reserved solely for those with standing in a related matter, but should be available to all in promoting the public interest. Moreover, the decision to provide information should not turn on whether the information relates to a private company or on who paid for the collection and processing of the information in question.

At a hearing held on September 5, 2001, the City Court of Miskolc ordered the defendant to disclose the requested information.

The defendant appealed the first level judicial decision, stating that the requested information served as a basis for making administrative decisions, and thus the preparatory nature of the information prevented its disclosure.

On November 13, 2001, the Borsod-Aba u j-Zemplen County Court upheld the first level court's judgement, and ordered the defendant to disclose the requested information. The court also construed the notion of information used in preparing a decision, and interpreted it in a narrow sense, giving priority to transparency and disclosure.

## Final outcome

While the final decision was still pending, the Inspectorate voluntarily provided part of the air emission data. The last piece of the requested information was delivered by the defendant to the plaintiff via mail. The costs of litigation, however, had still not been transferred to the plaintiff from the defendant by August 2002.

## Related actions and campaigns

Ecological Institute for Sustainable Development Miskolc, an environmental NGO supporting Kovari in his suit, participated in an environmental impact assessment of BEM Co.

In August 2000, local residents also filed a complaint with the ombudsman concerning the process of granting BEM Co.'s permit and complaining about the shortcomings of the EIA process.

## Access to justice techniques

Kovari filed a lawsuit as soon as his request was denied in order to compel judicial review of the Inspectorate's policy on information access.

## Case study analysis

The instant case reveals the advantage of filing a lawsuit in response to the government refusing to provide access to information. While the decision was pending, the Inspectorate voluntarily provided some information. Perhaps more significantly, the court defined concepts and established precedent for the interpretation of the applicable information law as a result of the lawsuit. Thus, the benefits of the lawsuit will extend beyond Kovari himself and may be used by other citizens and NGOs in future.

Given that the lawsuit was filed by an individual there was a minimum court fee. If an NGO were to initiate a similar lawsuit, there would be no fee. Because fees in such matters are either nominal or non-existent, there is little hesitation in initiating such review processes.

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# Kazakhstan Case 1

## Petrol Plant Case

An NGO challenged a municipality issuing a permit for the construction of a petrol station without allowing expert testimony representing public interest concerns to be heard during hearings on the proposed station.

### Relevant Aarhus provisions

- Articles 9(2) and (4)

### Key issues

- Review of public participation in decisions on specific activities
- Independent environmental expert testimony

### Parties involved

**Plaintiff:** Asian and American Partnership (“Partnership”), NGO

**Defendant:** Almaty City Government

### Background facts

The Akim (local government) of Almaty initiated a proceeding to construct a petrol station in a densely populated district of Almaty. During the course of the proceedings, the Akim refused to hear any environmental expert testimony addressing potential environmental harm stemming from construction of the station. The station was subsequently constructed.

### Procedural history

On behalf of individual Almaty citizens opposed to the construction of the station, the Partnership filed a lawsuit against the city government seeking to halt construction of the station.

The court ruled in favour of the city, stating that the city was reasonable in deciding that environmental expert testimony was not necessary in the light of existing documents and the deliberations already made by the city. Further, the court found no clear evidence that the station posed an environmental threat justifying the need for construction to be halted in the absence of environmental expert testimony.

### Final outcome

Despite the court’s ruling, a settlement agreement was reached in November 2000 between the owners of the petrol station and the Partnership, allowing for several environmental safeguards to be implemented at the station.

### Related actions and campaigns

None reported.

### Access to justice techniques

The Partnership attempted to participate in administrative proceedings concerning the construction by offering expert testimony to counter the government’s expert. Upon being denied, judicial review of the city’s decision was sought. Despite losing the case, the NGO was able to influence the final plans.

### Case study analysis

The case underscores a continuing lack of procedural rights to public participation in administrative hearings. Both the decision of the city to deny expert testimony countering the city’s assertions and the court’s affirmation of this decision were arbitrary and without due cause.

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# Kazakhstan Case 2

## Waste in the Caspian

A local NGO's efforts to enforce existing environmental laws against a drilling company were made more difficult by a lack of guiding precedent and an absence of a consistently applied procedural mechanism for enforcing applicable law.

### Relevant Aarhus provision

- Article 9(3)

### Key issue

- Direct enforcement

### Parties involved

**Plaintiff:** PU Caspiy — XXI (PU)

**Defendant:** Offshore Kazakhstan International Operating Company (OKIOC)

### Background facts

From July 1999, OKIOC discharged 36-38 tonnes per day of unfiltered waste into shallow waters of the North Caspian Sea.

Subsequent monitoring revealed that areas adjacent to the discharges were highly toxic and posed a threat to surrounding aquatic plantlife and wildlife.

OKIOC's discharges took place in a state sanctuary zone within the Caspian Sea.

### Procedural history

PU submitted several letters to the local procurator (prosecutor) of Atyrau requesting that relevant provisions

of special environmental regulations for the sanctuary zone, as well as provisions of the 1997 Law on Specially Protected Areas, should be enforced against OKIOC.

In response to PU's complaint, a panel of prosecutors confirmed that OKIOC had in fact unlawfully discharged pollutants into the protected zone, but refused to bring an enforcement action against the company. Instead, the panel merely issued a declaration that such discharges should cease, as they were in violation of the Law on Specially Protected Areas.

### Final outcome

No further action was taken nor was OKIOC made to pay damages for environmental harm caused by its actions.

### Related actions and campaigns

None reported.

### Access to justice techniques

PU pursued its only option for legal action — seeking the representation of its interests by the local procurator.

### Case study analysis

In this matter, PU lacked the ability to bring a suit directly against OKIOC. Instead, PU's only option was to petition the local panel of prosecutors to represent its interests against the company. Such reliance is problematic in terms of environmental law enforcement where prosecutors lack precedent and expertise to guide them in bringing suits.

Furthermore, prosecutors, as arms of the state, are often influenced by other interests and will therefore often not enforce laws aggressively. If PU had had a procedural right to bring suit directly as an environmental association, the result might have been different.

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# Kazakhstan Case 3

## Excessive Fees Case

An NGO representative was not shielded from legal action for comments made at a public hearing. Furthermore, the public prosecutor defending the representative demanded excessive fees for legal services, despite the court's failure to resolve the matter.

## Relevant Aarhus provisions

- Articles 3(8) and 9(4)

## Key issues

- Review of public participation in decision-making
- SLAPP suits
- Financial barriers

## Parties involved

**Plaintiff:** LTD Monitoring, environmental monitoring laboratory

**Defendant:** Ms. Chernova, representative, Caspiy Tabigaty (NGO)

**Defendant's representation:** Atyrau Public Prosecutor Office

## Background facts

On April 7, 2000, at a public hearing in conjunction with an environmental impact assessment (EIA) of a local development project, Ms. Chernova, representing the NGO Caspiy Tabigaty, asserted that the company seeking permission for the project heavily polluted the site.

Chernova's remarks stood in sharp contrast to earlier testimony by LTD Monitoring, a laboratory hired by the

company to conduct environmental monitoring onsite. LTD Monitoring testified that no increases in discharges of pollutants were observed.

To defend herself against LTD Monitoring's claims, Chernova sought representation by the Atyrau Public Prosecutor.

## Procedural history

The director of LTD Monitoring filed a lawsuit in May 2000, in the Atyrau City Court against Chernova alleging that her remarks damaged the business reputation of the laboratory. The laboratory sought KZT 1 million (USD 7,000) as compensation for "moral harm" done to the company by Chernova's statements.

After seven months and the calling of several witnesses, the City Court failed to resolve the claim and on December 31, 2000, ruled the matter closed without a decision.

## Final outcome

Despite the absence of a court ruling, the Public Prosecutor required a fee of KZT 20,000 (USD 141) from Chernova for its representation.

## Related actions and campaigns

None reported.

## Access to justice techniques

Chernova pursued her only viable option for legal defence — seeking representation by the local prosecutor.

## Case study analysis

Chernova's statements regarding pollution onsite should not be permitted to be a source of litigation. When speaking in the course of a public hearing, those making

comments that are neither slanderous nor libellous should be granted immunity from potential lawsuits.

In this matter, Chernova's testimony directly related to the EIA and thus was relevant and proper. Allowing parties to bring lawsuits against individuals for such comments made during public hearings prevents greater public participation. For fear of having to go to court and paying significant fees, those who should otherwise testify at hearings will not.

The excessive fee required of Chernova for her representation is an additional hurdle to public participation and access to justice. In this matter, the fee should have been either reduced or waived given the subject matter of the suit and Chernova's status as an NGO representative. In addition, a fee shifting or fee forgiveness scheme should be used when, as here, the party suing has not succeeded on

the merits and is in a better financial position than the defendant.

In sum, requiring that individuals and NGOs pay extreme fees with no opportunity for fee shifting or waiver prevents socially important litigation from being filed. In addition, as illustrated in this case, it also makes it difficult for individuals and NGOs to defend themselves for having participated in public decision-making.

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# Lithuania Case 1

## Extrajudicial procedure

The extrajudicial procedure to challenge acts and omissions by public authorities that contravene provisions of the national law may provide an excellent remedy for denials of the right of access to information of members of the public.

## Relevant Aarhus provisions

- Article 9(3) and (4)

## Key issues

- Administrative review procedure on substantive environmental law issues
- Extraordinary appeals
- Injunctive relief

## Case study details

**Cited case name:** Complaint of Residents, dated June 8, 2000 (registration no. 2000/05).

## Parties involved

**Plaintiffs:** Resident 1 and Resident 2

**Defendants:** Public officials of the ministries of Environment and Health in the early procedure, and later the ministries of Environment and Health themselves

## Background facts

On April 17, 2000, Resident 1, on behalf of the residents of Zemiejė Sanciai region of Kaunas appealed to the Ministry of Environment to assess the actions of two public

officials of the Kaunas Region Environmental Protection Department (REPD), when they adjusted the detailed territorial plan for building a filling station at 67 A. Juozapaviciaus Avenue. The claimant specified that paragraphs 31-33 of the Special Provisions of the Exploitation of Land and Forest, adopted by Resolution no. 345 of March 24, 1998, of the government of the Republic of Lithuania, were seriously violated when adjusting the detailed territorial plan. The suitability (geographic location, ecological situation) of the land plot at 67 A. Juozapaviciaus Avenue for building the filling station had not been assessed, and the public officials of Kaunas REPD ignored violations of the devised and adjusted detailed plan:

- 1) The protection zone of the liquid fuel station was not observed.
- 2) The distance from the underground fuel reservoir to residential houses was shorter than is required by the standards.
- 3) The detailed plan was devised on the basis of non-existent requests of residents to change the designation of their residential houses.

The fact that signatures of over 200 residents protesting against the building of the filling station on this land plot had been collected was not taken into account. The claimant, on behalf of the residents of Zemiejė Sanciai region, requested the establishment of an independent expert commission to assess the actions of public officials of Kaunas REPD.

The vice-minister of Environment, in letter no. 01-24-2081 "Concerning the Actions of Kaunas REPD when adjusting the detailed plan of the land plot at 67 A. Juozapaviciaus av." of May 16, 2000, answered to Resident 1 that:

- 1) Kaunas REPD did not object to the consideration of the land plot located at 67 A. Juozapaviciaus Avenue in

Zemieji Sanciai as a place for building the filling station, keeping the standard distances to residential houses and other buildings.

- 2) It was shown in the conditions of the detailed plan of the land plot and the main scheme drawn up by special-purpose company Kauno Planas that the multi-apartment house at 26 Sodu street was 50 meters away from the filling station, which complied with the standards, and private houses at 65 A. Juozapaviciaus Avenue and 34 Sodu street were 15 metres and 27.5 metres away, respectively. However, it was also indicated in the conditions that it was only possible to build the filling station after changing the designation of these houses from residential to economic-commercial, as the distance from these buildings to the underground reservoir of the filling station was less than 50 metres.
- 3) During the design stage, designers planning the filling station would have to conduct research on air pollution and assess the planned level of pollutants to be discharged into the air. Kaunas REPD would make the decision on building alternatives, according to the letter, only when the project was in conformity with all environmental requirements and when the conditions of the detailed plan regarding the change in designation of buildings from residential to economic-commercial needs were implemented.

However, no assessment was made of the actions of the public officials of Kaunas REPD when adjusting the detailed plan for building of the filling station at 67 A. Juozapaviciaus Avenue, in the answer of the vice-minister of Environment. The commission of experts for the assessment of environmental violations requested by the claimant was not established. Thus, the Ministry of Environment violated paragraphs 6.11 and 6.13 of the Regulations of the Ministry of Environment, adopted on September 22, 1998, by Resolution no. 1138 of the government of the Republic of Lithuania.

On April 17, 2000, Resident 2, on behalf of the residents of Zemieji Sanciai region of Kaunas city, appealed to the Ministry of Health, requesting the assessment of the actions of Kaunas PHC when adjusting and adopting the detailed territorial plan for building the filling station. The claimant pointed out that, having adjusted the detailed territorial plan, Kaunas PHC had violated paragraphs 31-33 of the Special Provisions on Exploitation of Land and Forest, adopted by Resolution no. 345 of March 24, 1998, of the government of the Republic of Lithuania. In her complaint, the claimant listed the same arguments as the ones stated in the complaint of Resident 1 of April 17, 2000, to the Ministry of Environment. In the opinion of the claimant, Kaunas residents' rights to a clean and healthy environment would be seriously violated if plans for the filling

station were approved. The claimant asked the Ministry of Health to establish a competent commission of experts who would assess the current situation and the violations committed when devising and adjusting the detailed plan for building the filling station.

The vice-minister of Health, in letter no. 31-08-2731 of May 19, 2000, responded to Resident 2 that the commission for the assessment of the legitimacy of activities of Kaunas PHC when approving and adjusting the detailed plan for building the filling station was established by Order no. 240 of May 5, 2000, of the Minister of Health. The commission assessed the situation and presented its findings. The Ministry of Health approved these findings. The Certificate "Concerning the Detailed Plan for Designing of Filling Station at 67 A. Juozapaviciaus av. in Kaunas" of May 11, 2000, of the expert commission stated the following violations:

- 1) In line with the scheme of the detailed plan, the distance from the underground fuel reservoir to the residential house at 26 Sodu street is 45 metres.
- 2) The submitted documents do not specify the way in which the condition of the general plan to change the designation of private houses at 34 Sodu street and 65 A. Juozapaviciaus Avenue to that of non-residential will be implemented.
- 3) The level of traffic noise was assessed in a contradictory way.
- 4) The stretch between Mazeikiu street and Sodu street was proposed to be widened in accordance with additional provisions of an initial environmental impact assessment of the detailed plan for the land plot at 67 A. Juozapaviciaus Avenue devised by the special-purpose company, Kauno Planas. Thus, the analysis of impacts for the safety of pedestrians had not been carried out.

The Commission submitted the following proposals:

- 1) The sanitation zone of the filling station at 67 A. Juozapaviciaus Avenue must conform to the requirements of existing legal acts.
- 2) Additional calculations of traffic noise on Mazeikiu and Sodu streets should be made.
- 3) The design should take pedestrian safety into account.

However, the letter of the vice-minister of Health did not respond to the request to assess the actions of Kaunas PHC when adjusting and adopting the detailed plan for building the filling station.

## Procedural history

The Chief Administrative Disputes Commission received the complaint of the claimants, Resident 1 and Resident 2, on June 8, 2000 (registration no. 2000/05-43), in which they asked the commission to assess the responsibility of the ministries of Environment and Health of the Republic of Lithuania when assessing the activities of employees of institutions under their subordination: Kaunas REPD, which is subordinate to the Ministry of Environment, and Kaunas Public Health Centre (Kaunas PHC), which is subordinate to the Ministry of Health.

The claimants stated in their complaint that they had appealed to the above ministries in accordance with administrative procedure. However, the responses of the ministries did not satisfy them, as the ministries only stated violations that the claimants had pointed out. The main request of the claimants to *review* and *assess* the actions of Kaunas REPD and Kaunas PHC when adjusting and approving the detailed territorial plan for building the filling station was not considered. The claimants asked the commission to order both the ministries of Environment and Health to assess their complaints of April 17, 2000, *exhaustively* in accordance with the Law on Public Administration of the Republic of Lithuania.

The Chief Administrative Dispute Commission appealed to the administration of Kaunas County Office (the institution responsible for the approval of documents of territorial planning) and the State Territorial Planning and Construction Inspectorate (which controls the preparation of territorial planning documents, carrying out adjustment and public consideration procedures, and verifying the conditions in these documents and their compliance with the requirements of the summary of territorial planning standards).

Letter no. S, G-595 of June 16, 2000, of the Kaunas County Administration to the Chief Administrative Dispute Commission asserted that “*the project has been adjusted with all institutions supervising whether the standards are being complied with, including Kaunas RPED and Kaunas PHC, and no comments were provided.*” The report on the public hearing indicated that “no observations or objections to this detailed plan were received during the public hearing.”

The head of the State Territorial Planning and Construction Inspectorate stated in his Letter no. 04-06-07-37-P of May 16, 2000, that the conditions of the detailed plan of the land plot at 67 A. Juozapaviciaus Avenue violated the requirements of Special Provisions on Exploitation of Land and Forest, adopted on March 24, 1998, by Resolution no. 345 of the government of the Republic of Lithuania, in that the residential house at 34 Sodu Street is within the protection zone of the filling station, and that the distance from the liquid fuel station and underground reservoir to the planned roadway in the territory of the filling station at Sodu Street is insufficient.

## Final outcome

The Chief Administrative Dispute Commission concluded that, in accordance with articles 6 and 8 of the Law on Environmental Protection of the Republic of Lithuania and paragraphs 7.8, 7.10, and 5.3 of the Regulations of the Ministry of Environment approved by Resolution no. 1138 of September 22, 1998, of the government of the Republic of Lithuania, the Ministry of Environment not only had the right but was also required to reverse or modify the decision of the regional environmental protection department. However, the Ministry of Environment only stated the violations committed by Kaunas REPD when adjusting the detailed plan and did not take any actions to reverse the decision of its subordinate institution.

The Chief Administrative Disputes Commission also concluded that, in accordance with paragraph 6.26 of Regulations of the Ministry of Health, adopted by Resolution no. 926 of July 24, 1998, of the government of the Republic of Lithuania, and articles 37 and 84 of the Law on the System of Health Care of the Republic of Lithuania, the Ministry of Health, after receiving the conclusions of the established commission had to assess the actions of the public officials of Kaunas PHC when adjusting the layout scheme of the filling stations in Kaunas city and the detailed plan for building the filling station on the land plot located on A. Juozapaviciaus Avenue. However, this was not done.

The Chief Administrative Dispute Commission decided, on the basis of the factual findings and the documents presented:

- to instruct R. Alekna, the minister of health, to ensure the assessment of the legitimacy of activities of the head of Kaunas PHC and responsible public officials, when adjusting the detailed plan of the land plot located at 67 A. Juozapaviciaus Avenue in Kaunas;
- to instruct D. Lygis, the minister of environment, to ensure that violations committed by the public officials of Kaunas REPD when adjusting the detailed plan of the land plot at 67 of A. Juozapaviciaus Avenue in Kaunas and “the correction of the lay out scheme of filling stations in Kaunas city (Supplement no. 2)” have been eliminated in accordance with the procedure established by law;
- to instruct the ministries of Health and Environment to notify the claimants by July 26, 2000, about the results of the enforcement of the decision; and
- that the decision of the Chief Administrative Dispute Commission must be carried out by July 26, 2000, with notification of the Chief Administrative Dispute Commission about its implementation.



The claimants had the right to appeal the decision of the Chief Administrative Dispute Commission to the Higher Administrative Court within a period of 20 days after receiving the decision.

The claimants also had the right to apply to the Higher Administrative Court concerning the enforcement of the decision of the Chief Administrative Dispute Commission, if the institutions responsible for the implementation of the decision did not implement it within the set time frame.

The ministries of Environment and Health enforced decision no. 2000/05-43 of the Chief Administrative Dispute Commission, dated June 22, 2000. Despite this, the claimants appealed to the Higher Administrative Court complaining about the insufficient implementation of the decision of the Chief Administrative Dispute Commission. However, they later withdrew the complaint.

### Related actions and campaigns

None reported.

### Access to justice techniques

The extrajudicial administrative procedure of the complaint (according to the Law on Administrative Dispute Commission of the Republic of Lithuania) was used as it is more expeditious than a lawsuit (a complaint shall be reviewed within 14 days after submission to the Commission) and free of charge for the parties involved (claimant and the institution appealed against).

### Case study analysis

The case reveals the advantages in specific cases of using the administrative review procedure instead of the judicial procedure that may entail more time and financial barriers. It also shows how the standard of review of administrative bodies over their subordinates can be developed through such appeals.

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# Moldova Case 1

## The Sarmi Park Case

Citizens residing near a public park faced a series of procedural and substantive obstacles before administrative bodies and the courts in attempting to participate in construction permit decisions related to the park.

### Relevant Aarhus provisions

- Article 9(1), (2), (3) and (4)

### Key issues

- Review of denial of access to information
- Administrative review procedure
- Injunctive relief
- Financial barriers
- Timely procedure

### Parties involved

**Plaintiff:** 10 residents from among 280 petitioners

**Plaintiffs' representation:** Ecolex, Moldovan public interest environmental NGO (Environmental Public Advocacy Center, or EPAC)

**Defendants:** FIFIRA, International Philanthropic Fund of the Afghanistan War Invalids; Chisinau Municipality

### Background facts

In October 1999, construction started on tracts of land in Sarmizegetusa Park in Chisinau, Moldova. In March 2000, several residents in the neighbourhood of the park sought the assistance of the Moldovan EPAC. EPAC attorneys determined that, since construction began, the residents of

the area had been unable to get information on what was being built and who the owners were, despite repeated requests to the municipal authorities. In addition, the residents attempted to file a complaint in court detailing their opposition to the decision to permit construction, pursuant to the Law on Petitioning, but remained unable to provoke any response from the municipality.

EPAC initially submitted a request for information under the Law on Environmental Protection. In April 2000, the Chisinau Municipality responded that the land in the park had been allocated to:

- 1) Nazaret Company, for construction of an office building and parking lot;
- 2) the International Philanthropic Fund of the Afghanistan War Invalids (FIFIRA), for construction of a 40-car parking lot; and
- 3) the Union of Evangelist Churches, for construction of a church.

The municipality further noted that after reviewing the citizens' petition, they would annul the decision allotting land to Nazaret Company.

### Procedural history

EPAC pressed the case to the higher-level government office charged with coordinating the activities of the local public administration, the Chisinau Prefect's Office. In a petition to the Prefect's Office, EPAC urged that the decisions allotting parkland to FIFIRA and the Union of Evangelist Churches should be remanded.

The Prefect's Office took no action, at which point EPAC, in accordance with the Law on Public Administration, took legal action, challenging the decision of the municipality in court. In addition, EPAC separately petitioned the Chisinau Environmental Agency to order a halt in construction because the necessary environmental

assessment had not been undertaken. The Environmental Agency ordered the cessation of construction.

In June 2000, EPAC's lawsuit was submitted to the Administrative Court of Chisinau Tribunal, naming Chisinau municipality and FIFIRA as defendants and requesting annulment of the municipality's decision and a halt to construction.<sup>34</sup> EPAC asserted that the residents' procedural rights had been violated given the failure to disclose information regarding the land allotment decision, to respond to the citizens' petition, and to secure a proper environmental expertise prior to starting construction. Moreover, the suit claimed, defendants committed substantive violations of both the Law on Green Spaces, which specifies that "constructions incompatible with the use of green spaces will be prohibited," and the Forest Code, which prohibits the removal of green spaces containing trees and bushes. Finally, EPAC alleged that FIFIRA violated Moldovan laws by taking a larger land surface than authorised, surrounding it with a fence, and removing several trees.

In its response, FIFIRA submitted documents of approval from the State Environmental Inspectorate, the Directorate of Control of Urban Construction, and the functioning authorisation of the Chisinau municipality.

At the onset of the court review, EPAC requested an injunction to halt construction, which was accepted by the court. During the trial period, construction was halted but began soon afterwards during the appeal process.

The court rejected EPAC's claims, on the basis that the Land Code, while enacted before construction began, was passed after the municipality's decision. Moreover, in September 2000, the municipality excluded Sarmizegetusa Park from the listing of parks to be considered as "green spaces," although this occurred during the course of the trial.

In November 2000, EPAC appealed to the Appeals Court of Moldova. Pending transfer of EPAC's appeal to the Appeals Court, the Ministry of the Environment investigated the municipality's actions in excluding the park from protective status and required that Sarmizegetusa Park must be included in the green space area of Chisinau. Meanwhile, construction resumed on the site. EPAC did not request a further injunction because FIFIRA threatened that they would request payment for damages from the EPAC if they won the case.

EPAC's appeal was not transferred to the Appeals Court until March 2001. Several court sessions were delayed due to the failure of the defendants to appear. Ultimately, the Appeals Court affirmed the lower court's decision, holding that EPAC's claims were without merit.

## Final outcome

EPAC's suit was appealed to the Supreme Court of Justice in March 2002. Since then, two hearings, in May and June 2002, were postponed due to the failure of the defendants to appear. On June 20, 2002, the Supreme Court of

Justice rejected the second appeal as groundless. At the request of the plaintiffs, EPAC was preparing an application to the European Court for Human Rights to appeal the decision once more. Meanwhile, despite the decree of the Environmental Agency to include the park as a protected green space, construction continued at the site.

## Related actions and campaigns

None reported.

## Access to justice techniques

EPAC pursued judicial review and appeals of the municipality's actions and applied for injunctive relief in the court of first instance.

## Case study analysis

### Obstacles to access to information

Initially, the citizens were unable to have proper or timely access to information. When aided by the EPAC in stating their demands, citizens were able to compel local government compliance with laws on access to information, but compliance clearly is a privileged exception rather than a standard practice.

### Excessive delay

Perhaps the most important obstacle illustrated by this case is the lack of a legal requirement regulating the appeals process or ensuring a speedy trial and decision. This manifests itself in several ways. First, defendants are given the opportunity to delay proceedings almost indefinitely. When there are no rules detailing when a defendant must respond, defendants can delay the start of a trial simply by failing to send their representative to court. In addition, once the initial court hearing is set, the case cannot proceed without signatures from both parties. This again offers the defendant a way to delay the trial by failing to appear.<sup>35</sup> While the judge can issue, in theory, a decision without the presence of the defendant and can issue a fine to the defendant for not appearing, this procedure is rarely applied in practice. This would not present a significant problem except that the defendant's absence from court, even when due to his own negligence, is a valid basis for appeal. Hence a defendant can guarantee that several trials will be necessary before a final decision can be rendered, simply by choosing not to attend his own trial!

Another aspect of the delay of the trial process in an appeal is that the transfer of court files and information to the higher-level court can take many months. In this case, one appeal required a delay of five months so that files could be transferred to the higher court.

### Injunctive relief

The failure to provide a speedy trial, for the reasons outlined above, is compounded by the reluctance of courts

or administrators to issue any sort of injunctive relief. Under the law, injunctions could have been issued by the Inspectorate for Construction Quality, the Environmental State Inspectorate, the municipality, or the court (notably, the Chisinau Environmental Agency, which called for a halt to construction, could not issue injunctions). When issued, failure to comply with an injunction, or efforts to sell property that is subject to a legal injunction, can be punished with a fine of up to 25 minimum salaries.

Most important, because there are no guidelines for judges in issuing injunctions, there was no way for EPAC to persuade the Appeals Court judge to issue an injunction once his initial decision was made. Hence, in this case, construction continued unabated even while EPAC judicially challenged the permitting of construction and a state government body issued an order of cessation.

Further, the provisions that allow for compensation of damages due to injunctions made it almost impossible for EPAC to press for an injunction after the first stage. In its discretion, the court can require a plaintiff to pay damages for the cost of the injunction to the defendant if he loses the case. In this case, EPAC's successful injunction ran out before the appeals process. EPAC faced the threat of large damage costs if it sought to renew the injunction and lost the appeal. This obstacle represents a continued problem in enabling citizens and NGOs to achieve injunctive relief.

The case also illustrates the impact of the denial of injunctive relief on efforts to secure rights and interests. Arguably, if construction were halted during appeal by an injunction, the municipality would have recognised the park as a green space requiring protection. The fact that construction commenced gave the municipality latitude to exclude the park from green space protection during the course of the trial.

### Overlap of responsibilities

The failure to define administrative jurisdictions among various government agencies involved in a common issue is illustrated by the conflicting and overlapping authorisa-

tions received by FIFIRA. For example, the Hydrometeo Agency approved construction of a parking lot for 40 cars, while the municipality authorised construction of an 80-car lot. In case of such a discrepancy, the Prosecutors' Office is empowered to resolve the disagreement, but has no time frame in which to act.

In the instant matter, EPAC received assurances that the Prosecutors' Office would resolve this discrepancy at the next municipality council meeting. Those assurances were the only action to be taken and appeared questionable given that representatives of the Prosecutors' Office rarely attend the meetings of the municipal council, despite being legally required to attend. In sum, the effort to coordinate permitting processes is cursory at best and hinders effective and meaningful citizen input and the representation of their interests.

### Judgement rationale

Another significant access to justice problem is that when a judge issues his decision on a case, he either accepts or rejects it, but does not provide any rationale for his decision. Holdings are provided when the case is appealed, and even then only after the appeal is submitted.

The effect of this is to prevent *de novo* review of the matter by the Appeals Court or allow the court to question independently whether the lower court abused its discretion. Rather than allowing for an attorney to challenge the logic of a judicial decision, the appeals stage becomes yet another opportunity for the lower court judge to reject the party's case — this time for the benefit of the higher court. This unfairly restricts the ability of lawyers to challenge anew the legal and factual analysis of the case.

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# Netherlands Case 1

## The Oily Bird Case

A broad judicial interpretation of standing allowed a Dutch conservation society to file suit against a shipping company in order to recover costs from rescuing sea birds injured by the company's oil spill in the North Sea, on the basis of general environmental harm.

### Relevant Aarhus provision

- Article 9(3)

### Key issues

- Standing
- Direct enforcement

### Case study details

**Cited case name:** Borcea, Arrondissementsrechtbank, Rotterdam 15 March 1991 (civil court)

### Parties involved

**Plaintiff:** Dutch Protection of Birds Society, Dutch NGO  
**Defendant:** Borcea, Romanian shipowner

### Background facts

In 1988, the Romanian bulk carrier, Borcea, had an accident in the North Sea causing a large oil spill. Consequently, coastal waters were heavily polluted and thousands of seabirds were beached, covered with oil. The Dutch Society for the Protection of Birds initiated an effort to care for and remove oil from the birds, spending considerable funds in the process.

### Procedural history

The Dutch Society for the Protection of Birds filed suit to recover costs from Borcea for removing oil from the seabirds, as well as the operational costs of maintaining bird asylums.

The court granted standing to the Society on the basis that preservation and protection of seabirds are common interests and, in that, such common interests are consistent with the aims of the Society.

### Final outcome

The Dutch Society for the Protection of Birds and the Romanian shipowner of the Borcea reached a settlement.

### Related actions and campaigns

None reported.

### Access to justice techniques

Judicial suit to recover costs related to spill that caused harm to the environment and without apparent individual harm to the Society.

### Case study analysis

In 1994, two articles were introduced into the Civil Code providing standing for interest groups (articles 305a and 305b, book 3). The necessary elements to establish standing include: being a legal person, having relevant objectives within the articles of association, and representing individuals with similar interests.

Despite this, however, a party is typically eligible for compensation only when it has demonstrated individual interests or harm. In the instant matter, an NGO was successfully conferred standing for the first time to seek compensation for costs stemming solely from *pure ecological damage*.

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# Netherlands Case 2

## The 'Indispensable' Pesticides Case

Delay tactics and “forum shopping” by the Dutch government created numerous obstacles for NGOs seeking to challenge government decisions concerning pesticide registration.

### Relevant Aarhus provisions

- Article 9(3) and (4)

### Key issues

- Standing
- Injunctive relief
- Standard of review (forum shopping)
- Limited review of government decisions by civil courts
- Direct effect of European directives
- Financial barriers

### Case study details

**Cited case name:** Indispensable Pesticides

### Parties involved

**Plaintiffs (collectively referred to as “NGOs”):** Society for Nature and Environment; Zuid-Hollandse Milieufederatie; Union of drinking water companies in the Netherlands (VEWIN); Drinking water company of Europoort; Water producing company of Brabantse Biesbosch; and Hydron Zuid Holland

**Defendant:** The State of the Netherlands (ministers of

Agriculture, Nature and Fisheries; Housing, Public Space and Environment; Health, Welfare and Sports; and Social Affairs and Employment)

**Third-parties (not officially taking part in the proceedings):** Organisation for Agriculture in the Netherlands (users); and Phytosanitary Organisation in the Netherlands (producers)

### Background facts

In the Netherlands, the use and sale of pesticides are not allowed unless they are registered under the 1962 Pesticides Law. Registration is valid for up to ten years, after which the pesticide must be re-registered. To be registered, a pesticide must meet a number of criteria laid down in the Pesticides Law, including environmental, user and public safety, and product quality requirements.

Since 1994, in the field of pesticides used in agriculture, the Dutch Pesticides Law has mainly been a vehicle for application of European Directive 91/414, which contains regimes for allowing pesticides to be marketed in EU member states. During a transitional period lasting until at least 2003, and probably until 2007, only general requirements within the Directive apply to national registration procedures. Further, these requirements apply only to pesticides containing “already existing” substances that have not yet been reviewed on a European level.

“Already existing” pesticides are those that were on the market before the directive became effective. The general requirements in the Directive are similar to Dutch law in that they forbid member states from registering pesticides if they do not meet environmental and other criteria.

This case concerned several “already existing” pesticides. As a consequence of earlier policies, a significant number of pesticides were eligible for re-registration in 1999. To be re-registered, under both the EU directive and the Dutch Pesticides Law, the holder of the pesticide had to provide detailed information about the product. In addition, the review was done *de novo* (i.e., as if it were a first



registration) and thus must again meet the criteria described above.

During the review process, it became clear that pesticides containing ingredients listed among the 20 most harmful active substances would not meet environmental criteria during the *de novo* review. Massive lobbying efforts by farmers' organisations were initiated to keep these pesticides on the market. Lobbyists insisted that these pesticides were "indispensable" to agriculture and should be retained. In the fall of 1999, at the request of the government, an effort was made to find a compromise. Stakeholders involved in settlement discussions included farmers' organisations, pesticide dealers, producers, environmental NGOs, and drinking water companies. In the end, a compromise was not reached.

In January 2000, the registration period for these pesticides ended. Under pressure from Parliament, however, the government issued an emergency regulation extending the registration of pesticides containing 11 active substances deemed to be "indispensable" for farming.

Section 8 of the Pesticides Law gives all "interested parties" the right of appeal against a decision based on this law. Under this provision, environmental NGOs are considered to be interested parties, and several groups thus filed an appeal against the regulation.

## Procedural history

In the Netherlands, a decision by a government body can usually be challenged in an administrative court. These administrative courts are served by specialised judges. NGOs filed a complaint before the Board of Appeal for Industry and Commerce and sought injunctive relief enjoining officials from extending the registration of the pesticides in question. In July 2000, the Board granted relief holding that, because the government regulation constituted a registration of pesticides without a review of the necessary criteria, the rule was a clear contravention of law.

In its turn, Parliament immediately enacted a statute in March 2001, explicitly allowing the pesticides at issue to remain on the market. This countermove was effective given that the Dutch Constitution expressly forbids administrative courts from reviewing statutes.<sup>36</sup>

Immediately afterwards, NGOs filed a civil action, summoning the State of the Netherlands to appear before the court in The Hague. NGOs asserted that the statute passed by Parliament conflicted with European Directive 91/414, and thus the State had committed a wrongful act, that is, a violation of the civil code. NGOs further requested that the President of the Court issue an injunction barring application of the law.

A hearing on injunctive relief was heard on May 17, 2001, and the Court promptly denied relief on May 30, 2001.

On July 1, 2001, the vice-minister published the list of indispensable pesticides considered registered. NGOs' attorneys took the view that this publication implied an

official decision about a concrete group of pesticides. NGOs filed an administrative appeal against these decisions, requesting a public review of the filed applications and questioning their completeness. In addition, NGOs requested injunctive relief.

## Final outcome

The administrative court set a hearing date for August 9, 2001. The day before the hearing, the vice-minister found the applications incomplete. Thus, the most important condition in the emergency law for provisional continuation of the registrations was not met. Consequently, the registrations were considered terminated immediately.

Some of these decisions were appealed to the courts by the applicants, but no injunctions were requested, so the pesticides were effectively removed from the market. So far, litigation started by the applicants was unsuccessful.

The main complaint was withdrawn in December 2001, as there was no longer a concrete interest to justify further litigation.

There was also no more need for a civil lawsuit as every future decision that would be taken with respect to "indispensable" pesticides could henceforth be challenged in an administrative court of law, which could then also decide about the legality of the law. The cost of litigation made pursuing this case unattractive in a civil court for principle.

After the enormous effort involved in designing an emergency law and guiding it through Parliament, in comparison to the meagre results, the government will probably not try a second time.

## Related actions and campaigns

None reported.

## Access to justice techniques

In light of limited prospects before the Civil Court in The Hague, NGOs' attorneys focused on application of the emergency pesticide law. Under the law, "indispensable" pesticides would be considered re-registered only when a "complete" application for registration had been filed. To be "complete," the application had to contain proof of indispensability and sufficient data for evaluation. In addition, the vice-minister of Agriculture had to publish those registrations assumed to be complete and thus able to be continued in the official gazette.

## Case study analysis

In seeking to enact emergency measures at odds with Dutch and most probably European law, Dutch officials had reason to stay out of court as long as possible, or at least conduct "forum shopping" in order to delay proceed-

ings. Under Dutch law, forum shopping is a logical tactic given that there is a difference in the depth of the review conducted by administrative courts and civil courts.

Administrative courts, led by specialised judges, are much more at ease in the field of law where they are operating. Case studies demonstrate that these courts are more aggressive in criticising government decisions and evaluating policies, facts and circumstances. Conversely, it is rather exceptional for civil courts to hear a case challenging a government decision and therefore it is much more reluctant to undo government decisions. In fact, civil courts have developed a practice of “marginal” review of government decisions. Marginal review means that a decision of a government body is only overturned if it is manifestly unsound. For example, if the government took into account a certain interest in making a decision or issuing a regulation, an explanatory note within the regulation stating that interest was considered is enough to convince the court that the government’s decision-making was reasonable.

A civil court’s unfamiliarity with some issues and narrow standard of review make injunctive relief difficult to obtain. Typically, injunctive relief is granted only when

the outcome of the main procedure is fairly predictable. Thus, in a complicated case such as the instant matter, civil courts will be very reluctant to grant relief.

In civil court legal representation is mandatory, requiring the services of an attorney. In addition, court fees may be significant and, when combined with attorneys’ fees, parties are required to pay significant costs for bringing a lawsuit. Moreover, NGOs receive no financial support for the cost of legal actions and fee shifting is not an option.

Conversely, in administrative procedures, court fees are fixed at EUR 200 and there is no risk of additional costs.

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# Poland Case 1

## The Highway and Housing Case

Local citizens used the courts to overcome administrative hurdles to access to information and public participation in their efforts to stop a highway from being built near their homes.

### Relevant Aarhus provisions

- Articles 9(2), (3) and (4)

### Key issues

- Fair, equitable and timely access to courts
- Standing
- Judicial review of public participation in decision-making
- Actio popularis
- Aggregation of claims
- Adequate and effective remedies

### Case study details

**Cited case name:** Highway Development Near Muchobor Maly Housing Development, Warsaw, Poland

### Parties involved

**Plaintiffs:** Residents of the Muchobor Maly Housing Estate  
**Defendant:** City of Warsaw

### Background facts

In 1997, Warsaw officials approved building and land management conditions as a preliminary step to issuing

construction permits for the development of a highway adjacent to the Muchobor Maly Housing Estate in Warsaw. Anticipating an increase in traffic and home construction, existing residents filed individual complaints, seeking judicial review of the city's decision and a halt to construction.

### Procedural history

Residents of the housing estate *separately* filed petitions to the Municipal Revocatory Council requesting an administrative proceeding concerning the building and land management conditions for the highway plan. The council initially denied these petitions on the basis that an individual must be a necessary party to the proceeding or have a legal interest to have standing.<sup>37</sup> According to the council, living in the nearby housing estate was not enough.

Several residents filed a complaint before the Supreme Administrative Court (NSA), asserting that the council's interpretation of the Polish administrative procedure rules was too narrow. The court agreed and ordered the council to determine which parties had a right to participate in official proceedings on the basis of its ruling. Subsequently, the council stated that inhabitants living closest to the proposed highway site had a sufficient legal interest and thus were necessary parties.

Those residents with standing separately filed new complaints before the Municipal Revocatory Council, asserting that the city's approved building and land management conditions should be declared invalid due to the failure to involve nearby inhabitants in the approval proceedings. Claimants also contended that the city's environmental impact statement (EIS) was inadequate, based on its failure to meet minimum requirements of the 1995 EIS protocol of the minister of environment. Shortcomings of the EIS included incomplete data, a failure to address key environmental factors, a lack of inquiry into alternate plans, and failure to address means of minimising environmental damage.

The council ruled in favour of the city, upholding the decision to approve construction. In turn, the residents appealed the decision to NSA. Attempting to file a single appeal for the multiple claims, attorneys for the residents drafted a single brief and affixed the signatures of the residents to the document. Under Polish law, however, a group of individuals cannot be treated as one party or as a class of plaintiffs. Only legal persons or the members of formal organisations may be treated as single subjects. As such, each resident had to appeal separately.

On September 5, 2000, NSA again ruled in favour of the residents, holding that the council's approval of the city's building and land management conditions was erroneous given the obvious shortcomings of the city's EIS.

### Final outcome

The appeals court was the final ruling in this matter. However, authorities were continuing construction. Under Polish law, overturning the city's building and land management conditions does not automatically negate building permits issued in reliance on the approved conditions. Each building permit must be appealed separately and as long as the building permit is in force, construction is legal.

### Related actions and campaigns

Residents organised an informal protest committee and conducted numerous high-profile events near the proposed construction site. In addition, the committee requested that the EIA Commission of the Ministry of Environment inspected the quality of the city's EIS — an essential step in using the inadequacy of the EIS as a legal argument. The committee also researched and suggested alternative locations publicly and before the court.

### Access to justice techniques

The residents' only recourse was to:

- establish standing as necessary parties with a legal interest in the matter; and
- seek judicial review of the city's decision and the procedures followed in making that decision.

### Case study analysis

In environmental law disputes, it is common for a number of individuals to have common claims against a single party. That the individual residents in this case were *separately* able to afford and secure the services of attorneys, file lawsuits and lodge appeals is a rarity in situations such as this. Where different citizens share a common legal interest in a matter, legal expenses are all too often extreme and will deny some individuals within that group the opportunity to seek redress in court. Class action suits, where individuals are joined together as one party by virtue of subject matter or legal claim, would go far in allowing individual citizens to pool together funds and efforts in seeking justice. For the benefit of the court, moreover, the *principle of efficient proceedings* requires that multiple appeals should be submitted as a single document and that the court issue a single ruling applicable to all.

Issues of fairness, applicability and damages can easily be addressed by uniform rules. For instance, rules qualifying individuals for membership based on subject matter and common issues of law would ensure that consolidation is uniform and fair to the defendant. Further, class action could be limited to a certain group of administrative or civil matters, where multiple plaintiffs seeking relief from a single defendant is common. Finally, rules of court could also regulate the allocation of damages and relief among the multiple parties.

This case also illustrates the importance of filing a complaint in court to challenge administrative proceedings designed to limit public participation. In filing a complaint, residents compelled the court to examine the city's practices in deciding who among the public has a right to participate in proceedings. The resulting change represented a significant victory in the effort to improve public participation in Poland.

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# Russia Case 1

## The Water Works: A Case in Progress

The benefit of seeking judicial review is illustrated as an NGO and several government agencies came together to challenge a massive project in a case raising public awareness of access to justice issues and establishing a valuable precedent for environmental law.

### Relevant Aarhus provisions

Article 9(2), (3) and (4)

### Key issues

- Interim injunctive relief
- Access to judicial review of government decisions
- Case strategy

### Case study details

**Cited case name:** Gudkov et al. v. State Construction Committee of the Russian Federation

### Parties involved

**Plaintiffs:** Deputy of the Russian Federation State Duma Gudkov; Deputy of Moscow Oblast Duma Alekseev; Deputy of Moscow Oblast Duma Tebin; Mashkin and Shevchenko, residents of Moscow Oblast; Regional Public Center for Human Rights and Environmental Defense, environmental NGO

**Defendant:** State Construction Committee of the Russian Federation (Mosoblcomunstroy)

### Background facts

In 1995, Moscow officials proposed construction of a massive water supply system involving construction

throughout Moscow and the surrounding region. Based on its preliminary environmental impact assessment (EIA), the Moscow Oblast Environmental Protection Committee rejected the proposal stating that the project was environmentally dangerous and economically unjustified.

However, the proposal received considerable support from isolated government agencies and commercial and design companies, and a massive lobbying campaign ensured that the project continued at least through the design stage. As a result, more than RUB 3 million (USD 150,000) in public funds was spent on project design.

Protests against the project were widespread. Moscow residents, local officials, NGOs and scientific experts all voiced opposition. Residents near the Oka River, an area that would be significantly affected by the project, were not informed of project details nor invited to participate in decision-making. In light of this and the broad opposition, the Moscow Oblast Duma (Parliament), with the support of the Moscow Oblast Prosecutor's Office, initiated an independent investigation in 1999, into the legality of the project and the RUB 3 million that was spent.

Despite this, RF Goscomecologia, the agency charged with issuing permits for the project to commence, decided in April 2000, that development of the project could continue, allegedly amid intense pressure from interested high-ranking government officials.

At the end of 2000, the Duma's investigation discovered several legal violations in development of the project. It also found that budgetary funds were spent illegally throughout the design stage. In addition, several significant changes to the scope and design over the past several years warranted a new EIA.

Despite these concerns, RF Goscomstroy approved permits in March 2001, for construction allowing the project to move forward.

### Procedural history

The Regional Public Center for Human Rights and Environmental Defense (RPC), an environmental NGO, filed a complaint seeking judicial review of the decision by

Goscomstroy to allow the construction of the project to move forward. Joining RPC as co-plaintiffs in the suit were a number of federal and local authorities opposed to the project. Plaintiffs alleged that the approval of the project was in violation of several environmental statutes.<sup>38</sup>

Defendants asserted that, in approving the project, they did not violate citizen rights, and that they acted in compliance with the Governmental Decree on Governmental Expertiza, a guidance document on construction matters without the force of law. As such, approval was an action not covered by law and therefore was not actionable.

A hearing date was scheduled for June 2001, and then for October 2001, but by August 2002, the case was still in court, as several expert examinations were required by the court before making a final judgement.

RPC attorneys requested interim injunctive relief at the first preliminary hearing, seeking a ruling that construction should be halted until a final court decision. The motion was rejected by the court.

### Final outcome

A decision was still pending in August 2002.

### Related actions and campaigns

Apart from the above action, the Moscow Oblast Prosecutor started an investigation that was still ongoing in August 2002. The prosecutor had received numerous complaints and affidavits from affected residents, regional NGOs and deputies of the Moscow Oblast Duma.

NGOs engaged in a mass media campaign and consistently filed complaints to the federal parliament. Information was gathered and disseminated to residents and water users of the Oka River region.

### Access to justice techniques

Understanding the Russian judiciary, lawyers for RPC decided to divide the various demands and arguments among the multiple plaintiffs and file them as separate

complaints. The intention was that, if the judge rejected some of the complaints, others would still be in court.

In addition, not all documents to be used as evidence were submitted with the complaints. Traditionally, defendants have taken advantage of the time between submission of documents and the hearing to influence the court in not accepting various materials. RPC submitted documents only a few at a time, at each hearing, in order to minimise the defendant's ability to use influence and power to corrupt the court's decisions. Similarly, a strategy was adopted to make motions to call on expert testimony at the hearing itself (rather than in advance) in order to avoid undue influence on witnesses.

### Case study analysis

The case provided an opportunity to establish precedents for the treatment of legislative provisions on EIAs, public participation, and access to information and justice. Further, because government officials from different levels of government were joined in the case with environmental NGOs, the case was expected to have considerable political impact and to raise awareness of environmental issues within the body politic. It was also expected to contribute to efforts to increase public awareness. The case's high profile will generate attention on important issues, including the environmental impact of government decisions, inadequate environmental citizen rights, poor environmental law implementation and enforcement, and limits on access to justice on matters both large and small.

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# Russia Case 2

## The Nikitin Case

This case is a judicial saga in which the rights of an individual to access and publicise environmental information collided with lingering traditions of excessive government control and secrecy — a tale of both the Russian judiciary's progress in ensuring justice and the long road that still lies ahead.

### Relevant Aarhus provisions

- Article 2(3), 3(8) and 9(4)

### Key issues

- Fair, equitable and timely procedure
- Judicial review of classification of information (national defence or public security exemption)
- SLAPP suits
- Independent judiciary

### Case study details

**Cited case name:** Russian Federation v. Nikitin

### Parties involved

**Plaintiffs:** Office of Prosecutor General of the Russian Federation; Federal Security Bureau, Russian Federation (RF)

**Defendant:** Aleksandr Nikitin

### Background facts

On October 5, 1995, the Federal Russian Security Police (FSB), the former KGB, raided the office of Bellona, a Norwegian NGO, in Murmansk, and confiscated the draft

version of Bellona's report on the handling of radioactive waste by the Russian Northern Fleet. One of the co-authors of the report, Aleksandr Nikitin, and several other Russian Bellona employees and contacts were brought in for interrogation. Nikitin's passport was confiscated. The materials prepared by Nikitin as a part of the report on the Russian Northern Fleet contained information about the radiation hazards posed by the Northern Fleet submarines and its run-down nuclear waste storage sites.

### Procedural history

Nikitin, a former captain of the Russian Navy, was arrested on February 6, 1996, by the FSB and accused of high treason in the form of espionage.

According to the FSB, Nikitin cooperated with and accepted payment from the Norwegian environmental organisation Bellona to gather "secret and top secret data" regarding the Navy's nuclear-powered submarine fleet and transferred this information to Bellona's representatives. FSB further charged that Nikitin's activities went beyond the scope of an environmental organisation, and that these activities had considerably impaired Russian defence capabilities.<sup>39</sup>

In his defence, Nikitin maintained that the information was already publicly available.

Brought to FSB's pre-trial detention centre in St. Petersburg, Nikitin was refused the lawyer of his choice, Yuri Schmidt, unless he agreed to abstain from travelling abroad for five years, and to have his telephone tapped for an unlimited period of time.

The Russian Constitutional Court ruled on March 27, 1996, that FSB's conditions violated articles 48 and 123(3) of the Russian Constitution. On March 29, Yuri Schmidt was appointed as Nikitin's lawyer. When studying the case file, Schmidt discovered that the charges against Nikitin were based entirely on secret and retroactive decrees of the Ministry of Defence.

While Nikitin was kept in custody, a number of high-



ranking officials within the Russian procuracy and the FSB stated publicly during the summer of 1996 that Nikitin was a traitor who had damaged Russia's defence capability. Since he had not confessed, he was accused of "actively counteracting the establishment of the truth."

In September 1996, Amnesty International adopted Nikitin as the first Russian prisoner of conscience since the downfall of the Soviet Union. Amnesty International asserted that the case was not based on national security interests.

FSB declared its investigation complete and officially charged Nikitin with treason through espionage, disclosure of state secrets, and abuse of military travel orders. This was the first charge of treason brought in Russia since the dissolution of the Soviet Union. Neither Nikitin nor his attorneys were given access to the military decrees upon which the charges were based.

Nikitin was released on December 14, 1996, from custody by order of the deputy prosecutor-general of Russia, Mikhail Katushev, and placed in "city arrest," which meant that he could not leave St. Petersburg. Katushev stated publicly that there was no evidence of espionage but that continued investigation was necessary. The director of the FSB, Nikolay Kovaliov, disagreed with Katushev's findings.

Katushev ordered the FSB in January 1997, to evaluate the case once more. In particular, Katushev stated that the following issues had to be resolved:

- 1) Charges should be based on existing law rather than secret and retroactive decrees.
- 2) It should be ascertained whether the information provided to Bellona was in fact publicly available.

FSB reasserted the charges against Nikitin on September 9, 1997, based on the invalid decrees. In determining whether the data had been previously made public, the FSB evaluated only a small number of possibilities and ignored many possible public sources of the information.

On April 21, 1998, the Russian prosecutor-general stated that charges against Nikitin based on the decrees at issue were contrary to the Constitution and ordered the FSB to drop its charges related to the alleged abuse of military travelling orders.

The FSB presented yet another set of charges on May 8, 1998, in which all references to the illegal decrees were removed.

The FSB presented its indictment on June 29, 1998, and forwarded the case to the St. Petersburg City Court.

On September 13, 1998, the City Court announced a trial date of October 20, 1998. The court declared that the charges related to abuse of military travel orders were without merit.

On the eve of the trial, the presiding judge, Sergei Golets, gave Nikitin and his defence team access to the secret and retroactive decrees. The decrees had arrived

from the Ministry of Defence the day before.

The court stopped the trial on October 29, 1998, and ordered additional investigation. According to the court, the alleged charges were so vague that Nikitin would be deprived of his right to defend himself with legal means without more information and legal assertions supporting the charges. The court ordered expert evaluations of the alleged state secrets in the Bellona report and all possible public sources of the information. In addition, the court ordered a new evaluation of the alleged damage caused to Russian national security.

On appeal, the Supreme Court's Collegium of Criminal Cases confirmed the order of the City Court on February 4, 1999, and returned the case to the FSB for additional investigation.

On April 20, 1999, the Russian Constitutional Court ruled that it is a violation of an individual's constitutional presumption of innocence to remand cases for additional investigation when the prosecution has not been able to present sufficient evidence for a guilty verdict. In such cases, the defendant should be acquitted.

Nevertheless, the FSB presented new expert evaluations on June 10, 1999, which like the previous expert evaluations, were conducted by the 8<sup>th</sup> Department of the Russian General Staff. The experts' conclusions on the state secrets in the report were the same as before. However, the amount of damages claimed was reduced from approximately USD 1 million to USD 20,000.

The FSB presented its new charges on July 2, 1999, similar to the previous ones and on August 28 presented its indictment and forwarded the case to the St. Petersburg City Court. Since the indictment quoted the parts of the Bellona report allegedly containing state secrets, the indictment was stamped secret. This considerably hindered the work of the defence.

The trial started in St. Petersburg City Court on November 22, 1999. The presiding judge was again Sergei Golets. By this time, the case was subject to considerable international and national interest.

In December 1999, while the trial was taking place, St. Petersburg TV ran a series under the vignette "Tracing Bellona," where both Nikitin and Bellona were accused of taking part in espionage activities. Inside the court room, an expert of the 8<sup>th</sup> Department of the General Staff admitted that its evaluation of whether state secrets appeared in the Bellona report was based, again, solely on the secret and retroactive decrees.

The Court found that no crime had been committed and acquitted Nikitin on December 29, 1999. It pointed out that the information in the Bellona report did not contain state secrets and declared that the indictment was a blatant violation of the Constitution since it was based on secret and retroactive decrees.

The prosecution appealed the decision on January 5, 2000, to the Supreme Court's Collegium of Criminal Cases,

claiming that it was based on an incorrect application of the law. It demanded that the case be remanded to the City Court and presided over by other judges.

The Supreme Court's Collegium accepted the case on March 29, 2000, but postponed the hearing at the request of the prosecutor-general, who requested to participate in the case.

On appeal, the prosecution substituted its initial plea on April 17, 2000, with a request that the matter be sent back to the FSB for additional investigation so that the "violations of the acquitted Nikitin's constitutional rights [could] be corrected." The Supreme Court's Collegium rejected the prosecution's plea and affirmed the City Court's acquittal.

Nikitin received a new passport on May 18, 2000, replacing the one that had been confiscated on October 5, 1995.

On July 19, 2000, the Presidium of the Supreme Court announced that it would hear the prosecutor-general's appeal against the acquittal on August 2, 2000. The defence had not been informed of the prosecution's application for appeal. On this date, the Presidium of the Supreme Court postponed the hearing until September 13, 2000. After a brief court hearing, the chairman of highest legal authority of the Russian Federation, Mr. V. Lebedev, affirmed the acquittal of Nikitin on September 13.

## Final outcome

After almost five years, city arrest and considerable expense, the case of Nikitin was finally settled.

## Related actions and campaigns

The authorities subsequently launched a tax investigation of the financial contributions made for Nikitin's defence. This was still ongoing in 2002.

## Access to justice techniques

It is difficult to refer to access to justice techniques in this case as Nikitin was an unwilling victim, persecuted for revealing embarrassing but truthful facts about an extremely dangerous environmental situation in the Arctic.

## Case study analysis

In order to defend himself, Nikitin made several appeals on the basis of the Russian Constitution that set enormously significant precedents and eventually resulted in his acquittal. While his own deeds were heroic and his strength formidable, all would have been lost if not for the equal fortitude of the judges who refused to accept the political directions of the FSB and those behind it. The independent judgement of the courts, based on the rule of law, was a testament to the changes in the legal system of the Russian Federation and by extension to other parts of the former Soviet Union. Nevertheless, other cases (such as the Pasko Case), which followed Nikitin, have demonstrated that the process of judicial reform in the Russian Federation is a long one with many bumps along the way.

While the FSB might have lost the case, it did succeed in sending a message to those who might wish to spread other truths about risks to public health and the environment over which those in power are responsible. Exercising rights to information and participation may continue to be fraught with peril in some parts of Europe.

Moreover, a further question was left unresolved by the Nikitin Case. While the FSB eventually lost the case — something that would have been unthinkable a generation ago — there was no backlash against those responsible for such a waste of time, energy and resources. Those abusing the justice system — the FSB and those behind it — not only went unpunished, but other parts of the state apparatus — the tax authorities — were mobilised to continue to persecute Nikitin after the main case failed.

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# Russia Case 3

## The Shrinking Park

Citizens seeking to protect a national park filed multiple motions for injunctive relief and sought to overturn related city government decrees given a failure to provide citizen access to relevant decision-making and information.

### Relevant Aarhus provisions

- Article 9(3) and (4).

### Key issues

- Direct enforcement
- Review of public participation in specific decision-making
- Injunctive relief
- Independent judiciary
- Financial barriers

### Case study details

**Cited case name:** The Shrinking Park

### Parties involved

**Plaintiffs:** Residents of a district near a natural and historic site (Sosnovskih, Startcev and Koroleva)

**Plaintiffs' representation:** Regional Public Center for Human Rights and Environmental Defense; Committee to Protect Neskuchnyi Sad (NGOs)  
Federal Prosecutor (as required by the Federal Law on Prosecutor in Russian Federation)

**Defendants:** Moscow City Government

### Background facts

In 1978, the Moscow City Council granted protected status to the historically and biologically significant park, Neskuchnyi Sad. Under national law, seizure of land within designated protected areas is strictly prohibited unless approved by the federal government. In 1994, without such approval, the Moscow City Government issued a decree decreasing the territory of Neskuchnyi Sad. Land removed from protected status was then transferred to the land development company, Compromstroy Ltd.

Compromstroy intended to construct two large buildings immediately adjacent to nearby residential homes and remove more than 200 old growth trees from the surrounding park lands. Despite the apparent impact to nearby residents and the local environment, Compromstroy did not conduct public hearings or discussion, nor did it inform residents from nearby apartments about construction plans. In addition, no environmental assessment was conducted by the government, as required by law.

Despite large-scale public protests, the Moscow City Government allowed construction to commence. Ultimately, 230 old growth trees were removed, a children's playground demolished, and a huge concrete fence erected around the construction site.

In response, the Committee to Protect Neskuchnyi Sad was established and several environmental NGOs, including the Moscow Ecological Federation, Russian Socio-Ecological Union, Congress of Russian Communities and the Regional Public Center For Human Rights and Environmental Defense, developed a coalition aimed at helping citizens to protect their constitutional environmental rights and prevent further degradation of Neskuchnyi Sad.

### Procedural history

In 1995, NGOs, on behalf of nearby residents, filed a lawsuit against the Moscow City Government before the Moscow City Court. In their complaint, NGOs asserted that decrees allowing for land transfer and construction violated several citizens' rights, including the right to:

- a healthy environment;
- timely and adequate environmental information; and
- public involvement (participation) in environmental decision-making (since no EIA or State Environmental Expertiza procedures were conducted as required under the Federal Law on Environment, the 1995 Expertiza Regulation, and the 1994 Regulation on EIA Procedure).<sup>40</sup>

NGOs also submitted a motion for injunctive relief seeking to halt construction until the case was resolved by the court. In seeking injunctive relief, NGOs asserted that construction was an environmentally dangerous activity that would render moot the relief sought if allowed to continue until court resolution. The court rejected the NGOs' motion. In 1997, the Moscow City Court rejected the complaint.

Citizens then appealed to the Supreme Court of the Russian Federation. The Supreme Court remanded the case to a second court within the Moscow City Court, citing the bias of the initial presiding court, and noting that the park's designation as a protected area had not been considered by the lower court.

In 1999, upon a rehearing, NGOs resubmitted their motion for injunctive relief. The second Moscow City Court rejected the motion and the complaint on rehearing. Again, the Russian Supreme Court remanded the case back for a third hearing.

In December 2000, the third court within the Moscow City Court to hear the case ruled in favour of the NGOs, acknowledging a violation of citizens' environmental rights and interests, and stated that the two Moscow Government Decrees of 1994 and 1997 were illegal.

In April 2001, the Russian Supreme Court rejected an appeal brought by *Compromstroy*.

## Final outcome

The court decision was widely disseminated in the mass media and on the Internet. After the final court ruling, the Moscow City Government issued decrees that abolished the prior decrees transferring land and permitting construction. The city also promised that the construction site will be cleaned up and 230 trees planted to replace those removed. Involved NGOs and citizens continued to monitor the city to ensure that the promises were kept.

Despite a favourable ruling halting construction, the court rejected a requested order that the Moscow City Government should be explicitly forbidden from repeating such violations of legislation and citizens' rights. Moreover, no compensation was awarded for moral damages caused by seven years of lengthy court litigation, damaging construction and the government's failure to comply with citizens' constitutional rights.

## Related actions and campaigns

At the beginning of the third court hearing before the Moscow City Court, lawyers of the Regional Public Center submitted an additional lawsuit on behalf of a citizen to cover moral damages caused to him by the activity of the defendant. This lawsuit was to be heard separately by the Moscow City Court, but as of August 2002, it was not yet settled.

In addition, four additional complaints were filed before the lowest district courts of Moscow against other related permits issued by different government agencies, including the permit to take and manage the piece of land, to conclude a 49-year lease, to cut 200 old growth trees, and to dig the basin and start construction works. All of these complaints were decided in favour of plaintiffs by the district courts.

## Access to justice techniques

Most importantly, a coalition of citizens and environmental and political NGOs was established as a means of pooling together resources to challenge the government on an issue of common concern. In doing so, the coalition had greater access to expert research (architectural, legal and scientific) and expert testimony on special matters, including land law precedents, management and construction activity, and design documentation.

In litigation, NGOs employed a procedural form of complaint (according to chapter 24-1 of the RF Civil Procedural Code) in order to expedite consideration of their claims. Further, at each stage of court hearings (especially at the very first stage), motions for injunctive relief were repeatedly submitted. In addition, all motions were submitted in writing (pursuant to Russian civil procedure, motions can be presented orally at the hearing). In doing this, the court's rejection of the motion must also be in writing and thus included in the case file for purposes of appeal. Such a technique provided an opportunity to educate judges on environmental and human rights legal issues — still largely unknown to judges at the time.

Finally, NGOs used precedent established by positive decisions on similar matters before other lower district courts.

## Case study analysis

Several obstacles to effective implementation of access to justice requirements as would be provided by the Aarhus Convention had to be overcome. First was corruption and the ignorance of public authorities about environmental laws. In order to ensure transparent judicial proceedings, NGOs submitted their motions in writing and supported their claims with existing precedent and thorough expert evidence. In addition, NGOs strived to maintain personal contacts with "friendly" officials in order to obtain the necessary documents concerning borders of the park from city archives.

Under the Russian Civil Procedural Code there is no “contingency” fee structure by which a plaintiff can forego payment to an attorney until the lawsuit has been resolved. Further, Russia is a “loser pays” jurisdiction in which a winning party can have its costs recovered by the losing party, but only when completely successful on the merits of its claim. This represents a substantial disincentive to citizens to enforce their environmental rights and a significant financial burden that prevents citizens from acquiring qualified professional legal service.

In response, lawyers of the Regional Public Center for Human Rights and Environmental Defense represented citizens *pro bono*, covering litigation expenses through funds from a project supported by the MacArthur and Ford Foundations. However, without state financial support to ensure capacity-building of civil society, such representation of citizen interests remains rare.

In all, NGOs submitted five written motions seeking

injunctive relief. That each motion was rejected signals the courts’ continued hesitation to interfere in areas of government influence before a final court decision.

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# Serbia and Montenegro Case 1

## The Silver Plate

A local resident participated in enforcement actions against a bakery operating without necessary approvals. Nevertheless, the bakery owners continued to operate while appealing several administrative decisions.

### Relevant Aarhus provision

- Article 9(3)

### Key issues

Direct enforcement

### Case study details

**Cited case name:** Srebreni Tanjir v. Secretariat for Inspection Affairs

### Parties involved

**Plaintiff:** Srebreni Tanjir (The Silver Plate), a bakery

**Defendant:** Secretariat for Inspection Affairs, Nis

**Third-party intervenor:** Pera Peric, resident

### Background facts

A company started bakery operations and only afterwards initiated the procedure for collecting the relevant environmental, health and other approvals. On July 20, 1999, a request was submitted to establish whether environmental protection requirements were met for the bakery operations. On August 4, Pera Peric submitted a request to be recognised as a party to the dispute. The bakery was situated in the same building as Peric's apartment (only a partition-wall separated them). On August 9 and 23, two inspections of the premises were carried out. In the meantime, on August 20, Peric was granted administrative standing.

On September 8, the Secretariat for Inspection Affairs issued a decision prohibiting the bakery activities on the basis of exceeding noise limitations. The company appealed against the decision to the Ministry of Environmental Protection (MOEP). On September 25, the bakery was inspected again, and the inspectorate closed it down.

The company owners thereafter obtained a report on the bakery's acoustic activity by an authorised expert, which confirmed that the noise from the bakery was within the permitted limits.

### Procedural history

On December 20, 1999, the MOEP rejected the appeal as unfounded in the light of the factual situation at the time when the first-instance decision was made. The company owners immediately initiated an administrative appeal before the Supreme Court of Serbia challenging the legality of the second-instance decision. The Supreme Court accepted the complaint filed by the company and on October 18, 2000, issued its decision annulling the decision of the MOEP in part on the basis of the later acoustic activity report obtained by the bakery owners.

Upon remand, the MOEP noted certain defects and contradictions in the documents. In particular, the report on the acoustic activity of the bakery differed significantly from a previous report prepared by another authorised organisation showing the volume of noise to be well beyond the permitted limits (48.5 decibels). In light of this situation, the MOEP decided on June 22, 2001, to engage a third authorised organisation to measure the level of noise in the environment.

The results of the new measurement concluded that the noise level exceeded the legally allowed level during the second phase of the baking process. Further investigations revealed that the company did not have the appropriate building construction and functioning permits. Based on these facts, the MOEP once again rejected the bakery's appeal against the decision of the Secretariat for



Inspection Affairs.

This decision was again appealed by the bakery to the Supreme Court.

### Final outcome

Once again, the Supreme Court accepted the complaint and annulled the decision of the MOEP. In August 2002, a new decision of the MOEP was still expected.

### Related actions and campaigns

None reported.

### Access to justice techniques

A neighbouring resident of a noisy bakery participated in an action to inspect the bakery's operations and in administrative procedures to enforce applicable law. The bakery, in turn, presented opposing scientific analyses and successfully challenged the administrative decisions in court. Parties used reconsideration by the same authority, administrative appeal and judicial appeal mechanisms.

### Case study analysis

The Law on Enterprises (Official Gazette of FRY, No. 29/96), article 18, stipulates that a company may start oper-

ations, perform operations and change the conditions of its operations when the competent authority issues a decision to the effect that it has fulfilled the requirements concerning technical equipment and facilities, safety at work, and protection and improvement of the environment, as well as other prescribed requirements. Accordingly, The Silver Plate was obligated to obtain, prior to starting operations, a decision from a relevant authority that environmental protection requirements had been met. However, establishing the real facts regarding the noise level proved to be difficult due to a lack of enforcement mechanisms. Other certified expert institutions had to be engaged to conduct measurements. This resulted in a "war of experts" and substantial opportunities for the court to choose whom to believe.

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# Serbia and Montenegro Case 2

## The Star Cafe

Tenants of a building with a noisy cafe initiated enforcement actions to apply noise regulations through their complaints to appropriate authorities. The appeal to the court system by the cafe owner significantly delayed action.

## Relevant Aarhus provisions

- Article 9(3) and (4)

## Key issues

- Direct enforcement

## Case study details

**Cited case name:** Sloboda Co. v. Ministry of Environmental Protection of Serbia

## Parties involved

**Plaintiffs:** Sloboda (Freedom), a catering company

**Defendants:** Department for Utilities, Housing Affairs and Environmental Protection of the Indjija Municipality

**Third-party intervenors:** Tenants Assembly of the building in Bloc 63

## Background facts

Sloboda operated Café Zvezda (Star) on the ground floor of a building in Bloc 63, facility 8 in Indjija Municipality. The tenants of the building complained about excessive noise coming from the cafe.

## Procedural history

On April 8, 1997, an inspector from the Department for Utilities, Housing Affairs and Environmental Protection of

the Indjija Municipality went to the cafe and established that the source of the noise was a Philips cassette recorder. Moreover, the cafe could not produce documents indicating that the noise level was in accordance with the rules on the permitted noise level in the environment (Official Gazette of the Republic of Serbia, no. 54/92).

On May 21, the inspector ordered Sloboda to measure the noise levels. As nothing was done to carry out the order, the noise was forcibly measured on September 19, by the inspector. It was established that the noise level exceeded the permitted level. On November 26, the inspector issued a decision to undertake noise protection measures and to prohibit future operations of the cafe. Sloboda appealed against this decision to the Ministry of Environmental Protection (MOEP).

On December 17, Sloboda had the noise level measured again by another authorised institution. Measurement was conducted only outside the premises, as the tenants refused to allow noise measurement inside the building because no noise protection measures that had been ordered, had been undertaken. The measurement showed that the noise level was below that permitted during daytime. On December 22, the inspector reversed his earlier decision banning the cafe's operation. The Tenants Assembly appealed this decision to the MOEP.

On January 22, 1998, the MOEP rejected the cafe's appeal against the decision to stop the operation of the cafe and accepted the tenants' appeal against the later decision of the inspector certifying that environmental protection conditions were fulfilled. The MOEP annulled this decision and sent the case back for review in order to establish the facts of the situation.

On January 25, 1998, Sloboda initiated an administrative dispute before the Supreme Court of Serbia. On September 16, 1998, the Supreme Court accepted the appeal and annulled the decision of the MOEP on formal grounds.

On December 7, 1998, the ministry ordered the case to be sent back for review to the first-instance authority, the inspector.

On January 28, 1999, the environmental protection inspector issued a new decision, temporarily prohibiting the use of the cafe until it could be established that the noise was within permitted limits. Both Sloboda and the Tenants Assembly appealed. On March 22, 1999, the MOEP rejected their appeals.

Meanwhile, on the basis of the decision of the Supreme Court, Sloboda brought an action on March 3, 1999, before the Commercial Court in Belgrade to require the MOEP to pay compensation for damages.

### Final outcome

The cafe has ceased operations. The decision of the Commercial Court was still not issued by August 2002.

### Related actions and campaigns

None reported.

### Access to justice techniques

Neighbours of a noisy cafe made complaints to the relevant authorities in order to enforce applicable noise regulations. The owners of the cafe, in turn, presented opposing scientific analyses and successfully challenged the administrative decision in court. In addition, the cafe was seeking damages from the MOEP for lost business. Parties used reconsideration by the same authority, administrative appeal and judicial appeal mechanisms.

### Case study analysis

The tenants appealed the decision by the first-instance authority regarding the factual situation (i.e. noise level). Even though it was ordered that the noise level should be measured, the lack of cooperation by different parties at different times, coupled with a lack of enforcement powers, meant that establishing the facts proved to be a real problem in this case. The noise was measured from outside the cafe and the real level was hard to establish. Although formal legal remedies were adequate, greater powers of enforcement were needed. Because the factual situation could not be established, all were dissatisfied.

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# Serbia and Montenegro Case 3

## The Cacak Case

Plaintiffs appealed against the approval of an environmental assessment, seeking review of wrongly established facts in the first detailed analysis, including area of land involved, the level of dust in the air and on the ground, noise produced by the quarry, and the safety of citizens around the quarry.

### Relevant Aarhus provisions

- Article 9(2) and (5)

### Key issues

- Review of public participation in decisions on specific activities
- Standing
- Reconsideration by the same authority
- Financial and other barriers

### Case study details

**Cited case name:** In re Susica-Cacak Quarry

### Parties involved

**Plaintiffs:** Residents of Cacak Municipality

**Plaintiffs' representation:** Public Legal Officer of Cacak Municipality

**Defendant:** Ministry of Environmental Protection of the Republic of Serbia

### Background facts

Under article 16 of the Law on Environmental

Protection of the Republic of Serbia (Official Gazette of the Republic of Serbia Nos. 66/91, 83/92, 53/93, 67/93, 48/94, 44/95 and 53/95), an analysis of the environmental impact must be made with respect to all facilities and works that may put the environment at serious risk. This analysis must be approved by the ministry in charge of environmental affairs and such an approval forms part of the urban planning and technical documentation. The law does not provide for public participation in the decision-making process. The Rules Regarding Environmental Impact Assessment (Official Gazette of the Republic of Serbia No. 61/92) list the facilities and works for which such an analysis must be made and specify how it is to be prepared and what it is to include.

On May 13, 1998, the detailed analysis of the environmental impact of exploitation of the Susica-Cacak strip mine on particular plots from the land registry situated in the Loznica community was made. Six days later, Putevi Company requested the approval of the Ministry of Environmental Protection (MOEP) of the detailed analysis.

Meanwhile, the residents living in the vicinity of the quarry approached the Public Legal Officer of Cacak Municipality for assistance.

The Ministry gave its approval on July 27.

### Procedural history

The same day (July 27, 1998) the public legal officer, as the legal representative of a group of citizens from the village of Loznica near Cacak, submitted a proposal to make another detailed analysis. One basis of the proposal was the fact that the initial analysis had not covered all of the relevant area in the vicinity of the quarry.

In November, the Republic Inspector for Environmental Protection ordered a temporary halt to the operations of the Susica karst crushing plant pending the completion of the measures provided for in the detailed analysis.

On December 14, 1998, the MOEP issued a decision annulling the approval decision of July 27, and permitting the

review of the procedure in light of the new facts raised by the residents. It ordered the procedure to be renewed for an elaboration of a new detailed analysis, having established that there were certain illogical points in the existing analysis.

The new analysis confirmed the findings of the previous one. On February 10, 1999, the MOEP issued a decision approving the new detailed analysis. On March 23, 1999, the Inspector established that the measures provided for in the detailed analysis had been implemented, and on April 30, the MOEP issued a decision noting that Putevi had fulfilled the environmental requirements for the conducting of its activities at the Susica karst crushing plant.

On August 13, 1999, the Public Legal Office of the Cacak Municipality, representing the residents of Cacak, appealed against the MOEP's approval of the new detailed analysis.

### Final outcome

On February 25, 2000, the Administrative Commission of the government of the Republic of Serbia rejected the appeal. From an administrative standpoint, the case was considered closed. However, the problem of the quarry remained prominent among the concerns of local residents and particularly of certain NGOs.

### Related actions and campaigns

NGOs continued to oppose the operation of the quarry.

### Access to justice techniques

The residents of Cacak took advantage of the opportunity to get legal assistance from the Public Legal Office of

the Cacak Municipality. They used reconsideration by the same authority and administrative appeals to try to overturn decisions approving the detailed analysis in an EIA.

### Case study analysis

There was no public participation in the development of the detailed analysis. Regulations of the Federal Republic of Yugoslavia and of the Republic of Serbia did not address public participation in decision-making regarding the preparation of environmental assessments. Consequently, there was no basis for the local residents to claim that their participation rights had been violated. The only opportunity for residents to challenge the conclusions, therefore, was to appeal against the decision approving the detailed analysis on the basis of legal insufficiency.

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# Spain Case 1

## Nuclear Files

On three separate occasions, an NGO was denied access to inspection reports prepared by a government agency concerning several nuclear facilities. Each time the NGO filed lawsuits to challenge the decisions, but the courts took several years to decide the matters.

## Relevant Aarhus provisions

- Articles 9(1), (4) and (5)

## Key issues

- Review of denial of access to information
- Timely and fair judicial review procedures
- Financial and other barriers

## Case study details

**Cited case name:** EEA v. CSN (3 cases)

## Parties involved

**Plaintiffs:** Ecologistas en Accion (EEA), Spanish NGO

**Defendants:** Consejo de Seguridad Nuclear (CSN), the Spanish government agency responsible for inspecting nuclear facilities and collecting and disseminating resulting information to the public

## CASE A

### Background facts

In 1998, the iron and steel company Acerinox, located near Cadiz, accidentally released caesium-137 radiation

into the atmosphere. CSN investigated the incident and prepared a report. EEA requested access to the report prepared by CSN on December 1, 1998. CSN denied EEA access to the report on December 21, 1998.

## Procedural history

An administrative suit was filed on February 2, 1999, before the Audiencia Nacional, a special division of the Supreme Court established in order to reduce the caseload of the Supreme Court and allow for more timely decisions. Audiencia Nacional has jurisdiction over judicial challenges brought against CSN. On February 29, 2000, the court ruled in favour of EEA and ordered CSN to make inspection reports concerning Acerinox available to EEA. On April 5, 2000, the state filed an annulment appeal before the Supreme Court challenging the Audiencia Nacional's decision. In addition, several companies intervened in support of the State's appeal.

## Final outcome

More than two years later, by July 2002, the court had not issued a final ruling on the state's appeal.

## CASE B

### Background facts

On December 21, 1995, EEA requested access to inspection reports from January 1992, to December 1995 on the activity of the Jose Cabrera nuclear power station located in Zorita, Guadalajara. On January 31, 1996, CSN denied access to the reports.

## Procedural history

EEA filed a lawsuit before the Eighth Section of the High Court of Madrid Autonomous Region on February 27, 1996, challenging CSN's refusal to provide the inspection

reports. Over three years later, on June 9, 1999, the court ruled in favour of CSN, denying EEA's request for the reports to be made available. EEA filed an annulment appeal before the High Court on June 29, 1999. Almost two years later, on June 18, 2001, citing a formal defect in the filed appeal, the High Court refused EEA's petition for appeal, thus sustaining the High Court's earlier decision.

### Final outcome

CSN's decision to deny access to reports on the Jose Cabrera power station was sustained.

## CASE C

### Background facts

On January 4, 1995, EEA requested access to several inspection reports from 1993 on the activity of the Santa Maria Garona nuclear power station, located near Burgos. On September 21, 1995, CSN denied access to the reports, citing the lack of Spanish transposition of Directive 90/313/EEC. It also maintained that the information requested was an unfinished document and concerned internal communications.

### Procedural history

EEA filed a lawsuit before the Ninth Section of the High Court of Madrid Autonomous Region on December 11, 1995, challenging CSN's decision to deny access to reports on the Santa Maria Garona nuclear power station. Almost four years later, on March 2, 1999, the court ruled in favour of EEA and ordered CSN to make inspection reports concerning Santa Maria Garona available to EEA. The court held that the requested information was neither an unfinished document nor privileged internal communications and the reports should thus be supplied to the applicant. The state immediately filed an annulment appeal before the Supreme Court challenging the lower court's decision.

### Final outcome

By July 2002, the case was still pending resolution of the appeal made by the legal representative of the state.

### Related actions and campaigns

EEA's legal actions were consistently accompanied by mass media activities aimed at raising awareness on the issue and seeking support from the public.

### Access to justice techniques

In all three cases, the plaintiffs used the judicial review procedure for enforcement of their right of access to information.

### Case study analysis

The excessive delay in the issuing of a final judgement on the plaintiff's requests reveals the court's general non-compliance with the Aarhus Convention requirements related to a fair, equitable and timely review procedure on issues related to access to environmental information. In all three cases, CSN cited as its reason for denying public access to the inspection reports that they were either unfinished documents or, alternately, privileged data or internal communications.<sup>41</sup>

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# Spain Case 2

## Aznalcollar Waste Dam

A Spanish NGO, filing a lawsuit against a mining company and regional government to force the clean-up of pollution from a breached waste dam located on the Guadiamar River, was required to post a substantial bond, despite establishing *locus standi*. In addition, the excessive length of the judicial process and the lack of court training and resources in dealing with complex pollution control issues prevented effective resolution of the case.

### Relevant Aarhus provisions

- Articles 9(3), (4) and (5)

### Key issues

- Direct enforcement
- Financial and other barriers (excessive bond requirement)
- Timeliness of judicial review
- Knowledge and capacity of judges

### Case study details

**Cited case name:** Donana National Park

### Parties involved

**Plaintiffs:** SEO/Birdlife and Coordinadora Ecologista Pacifista of Andalusia (the latter since has merged with Ecologistas en Accion), two Spanish NGOs (NGOs)

**Defendants:** Boliden-Apirsa, Swedish multinational corporation and owner of the Aznalcollar mining facility; The Guadalquivir Basin Authority; Ministry of the

Environment, responsible for protecting the National Park and in general for controlling the enforcement of environmental legislation in Spain; and the Regional Government of Andalusia, responsible for implementing and enforcing environmental legislation in Andalusia and protecting Donana Park

### Background facts

In 1979, Boliden-Apirsa was authorised to construct a waste dam on the Guadiamar River to collect and treat waste produced by its Aznalcollar pyrite mine. Several studies conducted in the early 1980s revealed a high degree of heavy metal pollution in the Guadiamar River, specifically indicating the “risk of an ecological catastrophe due to the pollution caused by cadmium, zinc, copper and lead.” Consequently, given that 75 percent of the river flows into Donana National Park, studies suggested that the park was threatened. Upon Spain’s ratification of the Ramsar Convention, Donana was listed as a Ramsar site.

In 1985, Boliden-Apirsa increased the height of the dam in order to increase its capacity. Several more height increases would follow. In 1988, NGOs filed a first complaint to the European Commission about the potential risk to Donana National Park posed by the Aznalcollar mining facility. Spanish authorities responded to the Commission two years later, stating that all prior episodes of pollution on the river were “completely solved.” Meanwhile, Donana was registered in the Montreux Register of the Ramsar Convention.

On September 4, 1992, NGOs filed a complaint before the Duty Magistrates’ Court requesting a judicial investigation into Boliden-Apirsa’s management of the mine. In addition, NGOs requested an investigation into the adequacy of enforcement of environmental legislation related to mine and waste dam operations by the director of the Andalusia Environmental Protection Agency.

On May 27, 1994, NGOs filed a complaint before the First Magistrates’ Court of Sanlucar la Mayor against Boliden-Apirsa, alleging that the company illegally stored



toxic pyrite ashes from another company behind the dam. In support of its lawsuit, NGOs subsequently submitted documents and other evidence to the court. In addition, the court requested information from Boliden-Apirsa and collected its own evidence.

On January 26, 1996, NGOs filed a complaint against Boliden-Apirsa before the director of Public Prosecution of the Principal Court of Seville Province, regarding the leakage of acid waters from the dam into the Agrio and Guadiamar rivers. Two months later, the director of Public Prosecution of Seville forwarded all documentation to the Second Magistrates' Court of Sanlúcar la Mayor to commence judicial review.

On March 4, 1997, the Second Magistrates' Court of Sanlúcar la Mayor ordered a stay of proceedings. Finally, one year and one day later, almost four years after NGOs filed their complaint to the First Magistrates' Court of Sanlúcar la Mayor, the court initiated the collection of evidence.

On March 25, 1998, NGOs submitted a second complaint to the European Union. The Commission decided that there was not enough evidence to start an infringement procedure.

On April 25, 1998, the Aznalcollar catastrophe took place. The dam broke and five hectare metres of polluted sludge and highly toxic water flowed into the Guadiamar River, at a site only 50 kilometres upstream of the Donana Marsh located within the park.

## Procedural history

The same day, NGOs filed a complaint to the Spanish Civil Guard against Boliden-Apirsa alleging criminal liability for discharging sulphuric acid and heavy metals, including mercury, arsenic and cadmium, into a hydrographic system encompassing several rivers and the Donana Marsh.

On May 13, 1998, NGOs filed a second lawsuit before the Second Magistrates' Court of Sanlúcar la Mayor against Boliden-Apirsa, the Guadalquivir Basin Authority, and the Industry and Environment departments of the Andalusia Regional Government alleging liability for the toxic discharge caused by the Aznalcollar dam breach. In addition, NGOs asserted Boliden-Apirsa's illegal attempt to conceal polluted sludge.

On June 3, 1998, the Second Magistrates' Court of Sanlúcar la Mayor requested a bond of PTA 5,000,000 from CEPA and SEO/Birdlife as a prerequisite for admitting their complaint and initiating the case. The NGOs appealed the decision.

On June 9, 1998, NGOs filed a second lawsuit before the Second Magistrates' Court of Sanlúcar la Mayor against several authorities alleging improper clean-up activities.

On appeal of the Second Magistrates' bond requirement, the Principal Court of Seville Province reduced the bond requirement to PTA 1,000,000 on October 15, 1998.

Subsequently, NGOs filed an additional lawsuit on November 19, 1998, before the Second Magistrates' Court

of Sanlúcar la Mayor against the Environment Department of the Andalusia Regional Government complaining of air pollution caused by the inappropriate removal of the sludge during clean-up operations.

NGOs made several requests to the Second Magistrates' Court of Sanlúcar la Mayor for the collection of evidence in relation to these suits in December.

On December 22, 2000, more than two years after the initial Aznalcollar-Donana suit was filed, the judge ordered a stay of proceedings, holding that, in the court's opinion, no parties had been found liable for causing the dam breach catastrophe. NGOs filed an appeal before the same court, which was denied on March 5, 2001. NGOs followed this with an appeal to the Court of Seville Province, challenging the stay order.

## Final outcome

In November 2001, the Court of Seville Province issued a decision on the appeal filed by NGOs in March 2001, ruling that there was no criminal offence involved in the dam break, and opening a civil case for compensation. The Andalusia Regional Government initiated a civil case for compensation of costs incurred for cleaning up the site.

## Relevant actions and campaigns

NGOs' legal efforts were consistently accompanied by mass media activities, including several public demonstrations.

## Access to justice techniques

The plaintiffs made use of the judicial review procedure, alleging the criminal liability of the company for the discharge of hazardous substances, while making use of the judicial review procedures available for acting against responsible public authorities. In spite of excessive bond requirements, the plaintiffs pursued their judicial remedies.

## Case study analysis

In the Spanish judicial system, the Second Magistrates' Court of Sanlúcar la Mayor is only responsible for "instructing" the case and preparing it for a second judge who is competent to make a judgement. However, the court did not have sufficient resources in terms of personnel, equipment or technical support to deal with such a complex case. This resulted in several difficulties for lawyers representing the parties, including accessing the case record, delays resulting from unusual timetables, and insufficient means to photocopy records and data. Insufficient administrative resources also caused inadequate assessment of the environmental damage caused by the dam breach catastrophe.

NGOs asserted that the Second Magistrates' Court improperly judged the case, and further, that the "instruc-

tion” given was improper because a considerable volume of environmental data and evidence was not properly accepted. NGOs asserted that the judge’s finding that there was insufficient evidence to establish liability was based on her failure to appreciate the volume of admissible evidence and data available.

The judge demonstrated a lack of understanding of core issues of the case related to environmental questions and competences, including the elements needed to establish an environmental criminal offence under article 325 of the Spanish Criminal Code. Consequently, court decisions regarding evidence were often inefficient — not allowing facts and their cause/effect links to be established. Moreover, the judge rejected many proposals made by the parties regarding the collection of evidence that would have alleviated this problem. Public authorities that should have been joined as defendants were not included and the court failed to find any party liable.

Despite having standing, the NGOs that were party to the suit were required to provide a bond of PTA 5,000,000 (EUR 30,050). After lodging an appeal, the bond was reduced to PTA 1,000,000 (EUR 6,010).

Three years passed before the Court issued a decision stating that the instruction phase should conclude because there was no criminal offence involved.

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# Ukraine Case 1

## South Bug River Case

A citizen denied access to environmental information concerning the development of a petrol station successfully challenged the denial in court.

### Relevant Aarhus provisions

- Article 9(1) and (4)

### Key issues

- Judicial review procedure
- Injunctive relief
- Review of denial of access to information
- Adequate remedies

### Case study details

**Cited case name:** Reznikov v. Chief Sanitary Inspector

### Parties involved

**Plaintiff:** Yuriy Reznikov

**Defendant:** Chief Sanitary Inspector

### Background facts

In the city of Khmelnytsky, the construction of a gasoline filling station started on the bank of the South Bug River. Yuriy Reznikov, deputy chairman of the Oblast Society for Environmental Protection, acting in a private capacity, requested health and environmental data from the regional Chief Sanitary Inspector regarding the petrol site. In particular, he requested assessments and forecasts

of health indices for Khmelnytsky citizens and air monitoring results.

Reznikov was denied any information regarding the potential environmental impact of the station, receiving only irrelevant data with no bearing on the site or local environmental conditions. The formal reply from the sanitation inspector — a common response to citizen information requests — simply stated: “the regional Sanitary Epidemiological Station (SES) has no materials concerning the construction of the gas station.”

The sanitation inspector ignored all further requests for information, in violation of Ukrainian laws on Information, on Citizen Appeals and on Ensuring Sanitary and Epidemiological Welfare of the Population.

### Procedural history

Reznikov filed a complaint with the Khmelnytsky City Court asserting that denying access to the requested information and ignoring information requests were illegal and requesting that the court order the Inspector’s office to provide the information. Initially, the court refused to register and consider Reznikov’s complaint. Only after increased media attention did the court review the complaint.

### Final outcome

On July 2, 1999, the court ruled in favour of Reznikov. The court declared the actions of the Chief Sanitation Inspector illegal and ordered him to provide the requested information.

### Related actions and campaigns

In this matter, the letter of the law combined with media pressure initiated by Reznikov overcame traditional access to justice obstacles.

## Access to justice techniques

In the instant matter, judicial review of the government official's action was the method chosen. However, a key to the success of this effort was the existence of a clear right-to-know law in Ukraine and pressure by the media on the court to enforce the law.

## Case study analysis

As a rule, it is difficult for public organisations and citizens to get required environmental information from officials. This case demonstrated for the first time that an ordinary citizen of Ukraine could use the court system to defend his or her right to access environmental information.

The Inspector's denial clearly violated Ukrainian laws on Information, on Citizen Appeals and on Ensuring Sanitary and Epidemic Welfare of the Population. More specifically, the Law of Ukraine on Information guarantees a broad right for citizens to information. In addition, article 4 of the Law of Ukraine on Ensuring Sanitary and Epidemiological Welfare of the Population grants citizens the right to true and timely information about the state of their health, the health of the population, and possible health risk factors and their degree. Article 7 of the Law of Ukraine on Citizen Appeals also notes that if an information request to a state authority refers to information outside its jurisdiction, the request has to be forwarded to a corresponding body or official within five days with notice

to the citizen.

Reznikov was able to bring suit against the government official pursuant to article 55 of the Constitution of Ukraine (1996), which confers to the individual a right to challenge the decisions, actions or omissions of bodies of state power, bodies of local self-government, officials and officers in court.

Generally, Ukrainian courts hesitate to review cases against government authorities. In this matter, the court initially stated that Reznikov's complaint would not be heard because there were many more serious and important cases to be considered. Such a hurdle in accessing the courts is problematic because citizens are often illegally denied access to information and need the courts to vindicate their rights.

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# Ukraine Case 2

## Oilfield Information Case

An NGO had to appeal to the courts after it was denied access to important environmental information in an effort to petition against the development of an oil field in a protected environmental sanctuary.

### Relevant Aarhus provisions

- Article 9(1) and (4)

### Key issues

- Review of denial of access to information
- Commercial confidentiality
- Financial barriers

### Case study details

**Cited case name:** Ecopravo-Lviv v. State Geology Committee

### Parties involved

**Plaintiff:** Ecopravo-Lviv, NGO Charitable Foundation (NGO)

**Defendant:** State Geology Committee

### Background facts

The NGO requested environmental information from a number of government agencies in order to become involved in the decision to permit Boryslav Oil Inc. to develop Stynava Oilfield in a protected water reservoir zone. In particular, the NGO requested from the State Geology Committee, a government agency, copies of the

license for oilfield development granted to Boryslav, including onsite environmental information, conditions for development in the area, potential liabilities and more.

The NGO made several requests for this information, but they were either ignored altogether or denied.

### Procedural history

The NGO filed a lawsuit against the State Geology Committee before the High Arbitration Court. Initially, the court rejected the complaint stating that the matter was not within the competence of the High Arbitration Court.

Subsequently, the NGO appealed the court decision to an Appeal Collegium of the High Arbitration Court. The Appeal Collegium reversed the lower Arbitration Court's decision and remanded the case for reconsideration by the High Arbitration Court under another judge.

The hearing was held on October 27, 1999. At the proceeding, the State Geology Committee offered the following arguments for denying the NGO access to the requested information:

- As an environmental organisation, the NGO required only environmental data, and licensing agreements were beyond the scope of a reasonable request.
- The NGO should have sought the information directly from Boryslav.
- The information requested was confidential business information and, alternately, expensive geological information that could not be provided free of charge.

### Final outcome

The court ruled that the Ukrainian Law on Information requires that the requested information should be provided. However, the court proposed that the committee provide the requested information of its own free will. The court reasoned that, if it was to invoke the Law on

Information, the committee's initial denial would be deemed illegal and thus the agency would be subject to a disciplinary penalty. Reluctantly, the committee provided the NGO with the information requested. The court imposed expenses on the committee.

### Related actions and campaigns

None reported.

### Access to justice techniques

The NGO sought judicial review of the committee's denial pursuant to the Arbitration Procedure Code. In furtherance of its claim, the NGO cited rights to information under the Law on Information and the Law on Environmental Protection.

### Case study analysis

The decision by the Appeal Collegium of the High Arbitration Court demonstrated that the denial of information to an NGO is clearly a matter for the courts to resolve. Citing the same information laws that confer a right to

information to citizens, the court ruled that the NGO had a right to the requested information as a matter of law.

In matters such as this, where the case involves juridical persons (i.e. NGOs and government agencies), court fees are higher than if an individual had brought the case. Consequently, many NGOs may decide not to pursue legal action, despite a legal right to information.

In this matter, the court decision to shift fee liability to the committee demonstrates an effective means of encouraging NGOs to bring meritorious suits and greatly improves overall access to justice.

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# Ukraine Case 3

## Pyrogovo Villagers Case

Residents living within a contaminated zone surrounding a city landfill were denied access to judicial proceedings to enforce a resettlement decree that had been issued several years before.

### Relevant Aarhus provision

- Article 9(3)

### Key issues

- Direct enforcement
- Judicial independence

### Case study details

**Cited case name:** Citizens v. Kyiv City Administration

### Parties involved

**Plaintiffs:** One hundred and twenty-eight (128) residents of the village of Pyrogovo

**Plaintiffs' representation:** Ecopravo-Kyiv

**Defendant:** Kyiv City Administration

### Background facts

In 1957, a Kyiv city dump was established near Pyrogovo village, 200 metres from the homes of 128 residents. Ukrainian law stated, however, that a 500-metre buffer should be created separating the landfill from residences. In constructing the landfill, design estimates and technical assessments were not conducted and relevant sanitation and environmental standards were largely ignored. Moreover, a radioactive waste plot, a gas-distribution station, and one of the biggest tobacco factories in

Europe, Reemtsma Ukraine, were situated nearby.

Severe contamination resulted over the course of 30 years. Kyiv environmental managers reported that the aquifers in the area were contaminated by chemicals and radioactive isotopes at depths of 40-70 metres. In addition, contaminated leachate extended upward to a depth of 9-10 metres, about 15 metres above protective barriers designed to contain the leachate from spilling into the surrounding neighbourhood. It was estimated that a heavy downpour or thaw would likely result in the flooding of leachate into the surrounding area.

In 1985, monitoring revealed that village wells were heavily contaminated with heavy metals such as mercury, lead and tritium exceeding maximum permissible concentrations (MPC) by ten to several hundred times.

Initially, rather than order a resettlement, city officials ordered new water pipelines to be constructed. Soon thereafter, the new pipes rusted and water contamination continued. In recent years, cancer deaths were reported in nine out of ten houses on Krasnoznamonnaya Street, located near the landfill.

Later in 1985, authorities ordered the resettlement of residents in the village. No action was taken, however. Similar decisions were made in 1987 and 1988, but again no action was taken.

### Procedural history

In the autumn of 1999, the citizens of Pyrogovo village requested Ecopravo-Kyiv to represent them in protecting their environmental rights by compelling authorities to carry out the ordered resettlement. On November 16, 1999, Ecopravo filed a complaint on behalf of the villagers seeking resettlement and damages from contamination and prior delays in relocating.

In preparing documents for presentation before the court, the Kyiv chief sanitation inspector produced evidence that Ukrainian laws on health, sanitation and environmental protection had been violated in the construction



and maintenance of the landfill. In addition, the Office of National Environmental Management in Kyiv confirmed violations of relevant environmental regulations in the maintenance of the site. Finally, city officials acknowledged onsite air, soil and underground water contamination, that an adverse health risk was present requiring immediate resettlement, and that the prior orders to resettle had not been carried out.

Despite these admissions, the court failed to rule immediately in favour of the villagers. Instead, the court ordered a stay in the proceedings so that officials could make another decision on resettlement.

On November 25, 1999, city officials decided again to resettle the inhabitants of the village of Pyrogovo, inventorying those to be relocated and offering real estate indemnity. The court did not return to the matter until January 12, 2000.

### Final outcome

The Pyrogovo village residents were provided with billets for new lodgings in Kyiv and were relocated.

On February 17, 2000, the court denied the villagers' claim for damages, stating that the claim was moot given that officials were now relocating them.

### Related actions and campaigns

None reported.

### Access to justice techniques

Ecopravo-Kyiv conducted several advisory meetings with the citizens of the Pyrogovo village. In addition, Ecopravo members visited villagers in their houses and surveyed the dump, the private plots of the villagers and the surrounding area.

In order to represent the citizens, Ecopravo signed a representation agreement with the villagers.

In preparation of the lawsuit, Ecopravo attorneys compiled documents and testimony from government officials. Given the complexity of the subject matter and documents, NGO attorneys had several meetings with the judge.

### Case study analysis

Had the court recognised the omissions of city officials in failing to resettle the villagers earlier, the villagers would likely have been successful in receiving compensation for health and property damage. Unfortunately, the judicial branch in Ukraine is not completely independent of government authorities. Thus, most court decisions are either vague or the scope of recovery allowed by citizens against the government is limited. From the nature of the proceedings, it is apparent that the court purposefully delayed proceedings so that authorities could have a chance to decide on resettlement anew, thus mooted the villagers' complaint and relieving the authorities of responsibility.

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# Ukraine Case 4

## The Troublesome Cafe

A citizen sought a court ruling that government permits granted without considering impacts to health and welfare of citizens are illegitimate, and sought compensation for damages stemming from state authorities' illegal permitting of a cafeteria beneath his residence.

### Relevant Aarhus provisions

- Article 9(2) and (4)

### Key issues

- Review of public participation in specific decision-making
- Adequate remedies (moral damages)

### Case study details

**Cited case name:** Vassylkivsky v. Shevchenkivski District Administration; Vassylkivsky v. Dnepr-A

### Parties involved

**Plaintiff:** Borys M. Vassylkivsky, Kyiv resident

**Plaintiff's representation:** Ecopravo-Kyiv

**Defendants:** Shevchenkivski District Administration in Kyiv (SDA); and Dnepr-A

### Background facts

In 1995, SDA granted a permit to Dnepr-A to operate a cafeteria in a building located on Artyoma Street in Kyiv.

Vassylkivsky sought the representation of Ecopravo-Kyiv (of which he was the chairman), a public interest legal aid organisation, and filed a complaint in the Shevchenkivski District Court asserting that SDA's permit

was illegal in light of several existing regulations. Specifically, Vassylkivsky claimed that SDA ignored existing building, fire prevention and sanitation rules in allowing the operation of a cafeteria beneath his residence that was inadequately equipped and noisy.<sup>44</sup>

### Procedural history

In his complaint to the Shevchenkivski District Court, Vassylkivsky sought a ruling that decision-making without consideration of public concerns is illegitimate and that the decision in this case should be declared invalid. In turn, SDA replied that the decision-making process in granting a permit to the cafeteria was mindful of citizen concerns and thus valid.

During the proceedings, the court found that SDA made no inquiries into whether the cafeteria was adequately equipped for food preparation and sanitation or whether the plans were modified to accommodate the interests and concerns of residents, including Vassylkivsky, who lived above the cafeteria. In addition, SDA was unable to produce any official project documents regarding the requested refurbishment of the premises, as required by law.

In 1997, given these findings, the court ruled that SDA's decision was illegitimate since SDA failed to collect the proper documents and did not consider the interests of nearby residents in light of the intended purpose of the refurbishment.

Subsequently, Vassylkivsky filed an additional lawsuit seeking compensation for "moral damages" inflicted by the operation of the illegitimate cafeteria.

The court again ruled in favour of Vassylkivsky, holding that moral and physical damage resulted from the cafeteria activities approved by SDA. However, the court rejected Vassylkivsky's damage calculations as speculative.

### Final outcome

Based on the court ruling, SDA reversed its prior deci-

sion and halted operation of the cafe until necessary measures were enacted to accommodate the interests and concerns of residents within the building. The civil suit for moral damages was not resolved.

### Related actions and campaigns

None reported.

### Access to justice techniques

Vassylkivsky used the courts to invalidate a decision that was not in accordance with the law. He employed the assistance of Ecopravo-Kyiv attorneys.

### Case study analysis

SDA's actions in this matter illustrate the continued difficulty citizens have in participating and enforcing their interests in official decision-making processes. To be sure, the existing laws cited in this matter provide substantive requirements that a government agency must abide by. However, what are needed are regulations with more specific and definite requirements guaranteeing that citizens are consulted and their interests are taken into account. Furthermore, citizens must be given ample opportunity to speak at hearings, particularly when the matter directly

affects them or their property.

Finally, while the court sided with the citizen in this matter, courts continue to limit the scope of relief available to a citizen when seeking compensation from the government. In addition, courts will often show greater flexibility towards the government in terms of claims unsupported by evidence and interpretations of ambiguous laws.

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# Ukraine Case 5

## Groundwater Information Case

Protection of NGOs' right of access to information was tested in this case.

### Relevant Aarhus provision

- Article 9(1)

### Key issues

- Review of denial of access to information
- Commercial confidentiality
- Defences to information requests (formulated in too general a manner)

### Case study details

**Cited case name:** Ecopravo-Lviv v. Brodyvodocanal (case no. 4/2436-31/197)

### Parties involved

**Plaintiff:** Ecopravo-Lviv, a charitable foundation

**Defendant:** State Communal Enterprise Brodyvodocanal

### Background facts

On May 23, 2001, Ecopravo-Lviv requested information from the communal enterprise Brodyvodocanal regarding the boundaries and sanitation protection zones of groundwater intake, plans for providing good quality water, plans for systematic laboratory control of water quality, and the state of relevant water resources. In a letter dated May 31, 2001, Brodyvodocanal refused the request, stating that article 30 of the Law on Information does not designate the information requested by Ecopravo-Lviv as publicly available information.

### Procedural history

In July 2001, Ecopravo-Lviv filed a lawsuit in the Economic Court in the Lviv Region requesting the court to:

- 1) declare the denial of the information request as unlawful and in violation of Ecopravo-Lviv's rights;
- 2) oblige Brodyvodocanal to provide the necessary information; and
- 3) require the defendant to pay court fees.

In the writ, Ecopravo-Lviv cited the Constitution of Ukraine, laws of Ukraine on Environmental Protection and on Information, and the Aarhus Convention.

The case commenced on August 7, 2001. Brodyvodocanal sent its response to the court stating that, according to article 4 of the Aarhus Convention, it can refuse to turn over information if the request is not well grounded or is written in too general a form. It also asserted that, according to article 30 of the Law on Enterprises, the information requested was commercial information, not environmental information, and was not referred to by the Cabinet of Ministers on the list of registers that are not considered as a commercial secret.

On November 1, 2001, the first court session was held where both parties presented their arguments. Not only Ecopravo-Lviv, but also Brodyvodocanal referred to the Aarhus Convention.

It was necessary for Ecopravo-Lviv to prove in court that:

- as an environmental public organisation it did not have to state in the information request the reasons for requesting the environmental information;
- its request was not too general; and
- the information requested was public information.

Arguments were stated in the memorandum given to the judge, and included the following.

As an environmental public organisation, Ecopravo-Lviv did not need to state reasons for its environmental information request. An absence of a reason for requesting the information could not be interpreted as “writing a request in a general form.”

Article 34 of the Constitution of Ukraine states that everyone has a right to collect, use and disseminate information in written, oral or other form. Article 50 of the Constitution guarantees the right of free access to information on the state of the environment and a right to disseminate such information. Such information cannot be held secret.

According to article 4 of the Aarhus Convention, public authorities should give environmental information to any member of the public in the frame of national legislation without requiring the member of the public to state an interest. Article 9 of the Water Code of Ukraine foresees the direct duty of organisations to inform the population on the state of water, and on measures taken to improve the state of water. Article 11 of the Water Code of Ukraine foresees the right of NGOs to receive information on the state of water, sources of pollution and water usage, and plans and measures on the use of waters and on the restoration of water resources. Article 21 of the Law of Ukraine on Environmental Protection establishes the right of environmental NGOs to receive information on the state of the environment, sources of pollution, and plans and measures concerning the environment.

The information requested was public (i.e. not a commercial or state secret). As the defendant did not claim that the requested information was a state secret, it was only necessary for Ecopravo-Lviv to prove that the requested information was not a commercial secret. According to the Decree of the Cabinet of Ministers of Ukraine on the list of documents that are not a commercial secret, documents that permit an activity or type of activity cannot be considered commercial secrets. The document under which Brodyvodocanal's licence to provide water was granted, was a permit for specific water usage under article 29 of the Water Code of Ukraine. Some of the information that was requested by Ecopravo-Lviv would be found in such permit.

Information contained on forms for state reporting requirements could also not be considered commercial secrets. Some of the information requested was required to be reported to the state by Brodyvodocanal, under article 24 of the Water Code and the Order of the State Committee of Statistics. Finally, information on environmental pollution could not be considered commercial secrets. Some information requested was information on water pollution.

Finally, according to the Law on Information, the Law on Enterprises, and the Order of the Main Revision Committee, the head of an enterprise must determine the content and volume of information considered a commercial secret, and the means for protecting its confidentiality (taking into account relevant legal provisions). Even if the information requested could have been a commercial

secret, the head of Brodyvodocanal never designated this information as a commercial secret.

## Final outcome

On November 9, 2001, at the second court session, the court ruled in favour of Ecopravo-Lviv in full, requiring Brodyvodocanal to hand over the necessary information, and pay the state fee of UAH 85 (USD 16) and technical expenses of the arbitration procedure of UAH 69 (USD 13). Three days later the court issued an order on compulsory implementation of the court's decision.

In December 2001, Brodyvodocanal handed over the information. On January 29, 2002, Ecopravo-Lviv addressed the Brodyvod Judicial Administration to request execution of the requirement to pay the court fees. On March 5, 2002, Brodyvodocanal paid the court fees of UAH 154 (USD 30).

## Related actions and campaigns

The plaintiff placed articles in the mass media and in the *Environmental Advocacy Bulletin*.

## Access to justice techniques

Ecopravo-Lviv applied to the courts to compel the state enterprise to provide the requested environmental information. It also asked the court to order the defendant to pay the court fees.

## Case study analysis

Under the legislation of Ukraine, information on environmental protection cannot be considered a commercial secret, although not all environmental information is exempt. The legislation of Ukraine does not clearly provide that an NGO can request information without giving a reason. The legal argumentation had to be made in court.

Giving a legal memorandum to the court with a detailed analysis of the legislation with citations can substantially help to achieve a positive result for the plaintiff.

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# United Kingdom Case 1

## The Lappel Bank Case

Seeking interim relief to stay development of a wetland and wild fowl breeding area pending a final judgement on the merits of its claim, a British NGO faced exceedingly narrow judicial standards making interim injunctive and declarative relief difficult to attain.

### Relevant Aarhus provisions

- Article 9(3) and (4)

### Key issues

- Direct enforcement
- Standing (sufficient interest)
- Injunctive relief
- Financial and other barriers (excessive bond requirements)

### Case study details

**Cited case name:** Regina v Secretary of State for the Environment, *ex parte* Royal Society for the Protection of Birds (Port of Sheerness Ltd, Intervenor)

### Parties involved

**Plaintiff:** Royal Society for the Protection of Birds (RSPB), British NGO

**Defendant:** Secretary of State for the Environment (the secretary), UK minister primarily responsible for environmental protection

**Third-party intervenor:** Port of Sheerness, commercial port facility; the United Kingdom, France, and the Commission of the European Communities participated in proceedings before the European Court of Justice (ECJ)

### Background facts

Lappel Bank, 22 hectares of intertidal mudflat, is part of the Medway Estuary and Marsh system, a large wetlands area serving as a breeding ground, migratory route and wintering area for substantial numbers of wildfowl and water species, including two species listed on Annex I of the European Union's wild birds directive. Lappel Bank itself provides feeding and sheltering grounds for a number of waders and wildfowl (although none listed in Annex I of the directive).

In December 1993, the Secretary of State for the Environment decided not to include Lappel Bank within a Special Protection Area (SPA) that was to be created under the wild birds directive, encompassing the remainder of the Medway Estuary and Marsh system. Pivotal to this decision was the fact that Lappel Bank bordered the Port of Sheerness, the fifth largest commercial port in the UK. The secretary concluded that the need to promote commercial viability of the port outweighed the area's conservation value. The decision was intended to safeguard the continued viability of the Port of Sheerness, a significant contributor to the economy of the surrounding area suffering from high unemployment.

### Procedural history

The RSPB requested judicial review of the secretary's decision by the Divisional Court of the Queen's Bench Division of the High Court, seeking to have the decision quashed on the grounds that it contravened the wild birds directive, as the secretary was not entitled to exclude Lappel Bank based on economic considerations. The Divisional Court refused the application in July 1994, and the RSPB appealed to the Court of Appeal.

In August 1994, a majority of the Court of Appeal upheld the decision of the Divisional Court and the RSPB subsequently appealed to the House of Lords. By order of February 9, 1995, the House of Lords stayed the proceedings pending a preliminary ruling from the European Court of



Justice (ECJ) on the issue whether the Secretary of State for the Environment was entitled, under the wild birds directive, to consider economic factors in making a decision.

Pending a final determination of the case, RSPB requested interim declaratory relief, conferring temporary protected status to Lappel Bank and halting any development. The House of Lords refused the RSPB's request.<sup>45</sup> Primary among the reasons for the House of Lords' refusal was the stated inability and unwillingness of RSPB to compensate the Port of Sheerness for losses resulting from the imposition of interim relief. Regardless of the intended benefit of a halt in development, such a delay could result in considerable commercial losses to the Port of Sheerness and thus the House of Lords would not grant interim relief in the absence of RSPB providing a "cross-undertaking" in damages. In support of its ruling, the court stated that, had the RSPB sought an interim injunction rather than a declaration, they would undoubtedly have been required to give such an undertaking as a condition of being granted relief.

The Advocate-General gave his Opinion on March 21, 1996 and the Court issued its judgement on July 11, 1996. The matter then returned to the House of Lords.

### Final outcome

Following the Advocate-General's conclusion, ECJ ruled that member states were not authorised to take into account economic requirements when designating SPAs under article 4 of the wild birds directive. The ECJ held that article 4 provides for the special protection of birds that are the most endangered in the Community (Annex I species) or constitute a common heritage (migratory species). Citing existing precedent, ECJ ruled that, given the particular vulnerability and importance of these classes of birds, the ornithological criteria laid down in paragraphs (1) and (2) of article 4 must be the sole determinants in classifying SPAs.<sup>46</sup>

Despite RSPB succeeding on the merits, however, Lappel Bank was destroyed *before final judgement was given*.

### Related actions and campaigns

None reported.

### Access to justice techniques

RSPB's choice to seek judicial review of the secretary's decision is the most commonly used means to challenge decisions of a public nature made by public bodies. In order to bring proceedings for judicial review, an individual or organisation must show that it has a "sufficient interest" in the matter concerned. UK courts tend to construe broadly what constitutes a sufficient interest in environmental cases, especially in relation to proceedings brought by NGOs. This case is a positive illustration of such liberal rules on standing in that RSPB's interest in the case arose from the environ-

mental and conservation implications of the decision, not from any direct private interest in the site itself.

### Case study analysis

Had the House of Lords granted interim relief, the destruction of Lappel Bank prior to a final determination would almost certainly have been avoided. While it is undoubtedly appropriate for national courts to retain discretion on whether interim relief should be granted in a particular case, the approach taken by the UK courts in this and other environmental cases underscores the consequences of unduly restrictive interpretation of when such relief should be granted.

Article 9(4) of the Aarhus Convention requires procedures covered by the Convention to provide "adequate and effective remedies, including injunctive relief as appropriate." Foremost, in terms of environmental cases, the approach taken by UK courts in determining whether to grant such interim injunctive and declaratory relief is unduly restrictive in that it focuses heavily on the availability of a cross-undertaking in damages by the party seeking interim relief (usually the environmental NGO) rather than examining a totality of factors, including the environmental interest at stake.

In cases where the applicant is seeking interim relief, such as an injunction to maintain the environmental status quo pending a final determination of the case, the UK courts take the general approach to interim injunctions laid down by the House of Lords in the 1975 case of *American Cyanamide v Ethicon*.<sup>47</sup> In essence, this requires the court to determine, first, whether there is a "serious issue to be tried" and, second, whether "the balance of convenience" lies in favour of granting or refusing the interlocutory relief that is sought.

A first stage in assessing the balance of convenience is to determine the availability to either party of an adequate remedy in damages. This means that, if damages would be an adequate remedy for the applicant for interim relief, if that party were ultimately to succeed in his claim, the court would not order interim relief. If this is not the case (as in many environmental cases) the court must go on to consider whether, if the party opposing interim relief (such as the developer in this case) is ultimately successful, that party would be adequately compensated for losses resulting from the imposition of interim relief by a cross-undertaking in damages from the person seeking interim relief. Only if the availability of damages does not resolve matters in this way will the court go on to examine the balance of convenience more generally. If damages would be an adequate remedy and the person seeking relief is in a position to pay them, courts have taken the approach that interim relief may be granted. In environmental cases, however, courts have tended to take the view that, where an NGO refuses or is unable to offer a cross-undertaking in damages, the interim relief should not be granted.

As evident in this case, in environmental judicial review proceedings, the challenge typically relates to a decision authorising or permitting some kind of development or activity with irreversible environmental consequences. Subsequently, the purpose of seeking interim relief in such cases is to prevent the development or activity at issue until the case has been resolved. This may take some time, particularly if, as in this case, a referral is made to the ECJ.

To the developer, generally, the financial consequences of halting development until final determination of the case may be significant. However, judicial review proceedings of this type are likely to be brought by environmental NGOs or by concerned individuals (such as local residents) who do not have the means or are not in a position to offer a cross-undertaking in damages to the developer to cover the cost of imposing interim relief should the case ultimately fail.

Consequently, if the court makes provision of a cross-undertaking in damages an indispensable requirement for obtaining interim relief, then interim relief will rarely be granted in environmental cases and irreversible damage may be done to the environment even in cases where the applicant ultimately succeeds in showing that the decision authorising the activity is unlawful.

Looking to avoid this conundrum, courts could take a broader view of the criteria for granting interim relief in environmental cases, based on an overall determination of the balance of convenience rather than on the availability of a cross-undertaking in damages alone. This would make it likely that interim relief would be granted more often in environmental cases. For example, a court could look at an assessment of the merits of the case, the position of the parties involved and the environmental interest at stake, including the costs of destroying the environmental interest concerned. It would then be in a position to grant interim relief even where a cross-undertaking in damages is not available.

The following factors may also be of particular relevance in environmental cases. It may be argued that, where a site has been designated for special protection, a developer is effectively put on notice that there are likely to be restrictions on damaging the site, and where the law is unclear, the benefit of the doubt should be given to the environmental interest until the position is determined. Courts should bear in mind that potential damage to the

environment is likely to be more difficult to quantify than potential economic losses incurred by a developer. It does not follow, however, that the economic loss always “trumps” environmental loss. Finally, where the applicant for interim relief is an environmental NGO acting in the public interest (as here) the approach to be taken to the granting of interim relief should not necessarily be the same as where two private interests are involved in a private claim.

It is not clear from the case law of the UK that the provision of a cross-undertaking in damages is an indispensable requirement for interim relief. In some cases, courts have dispensed with the requirement because the person seeking interim relief is impecunious. Perhaps more importantly, in a number of leading cases, the courts appear to have taken a broader approach to the question of interim relief. In *Films Rover Ltd v Cannon Films Sales Ltd*,<sup>48</sup> a decision of the High Court, the judge noted, “The principal dilemma about the grant of interlocutory injunctions ... is that there is by definition a risk that the court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial ... or alternatively, in failing to grant an injunction to a party who succeeds ... at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to be ‘wrong’ in the sense I have described.”

If this general approach of seeking whichever course carries the lower risk of injustice is adopted in environmental cases where there is a real likelihood of irreversible damage to an important environmental interest, there should be fewer cases where interim relief is refused even in the absence of a cross-undertaking in damages.

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# United Kingdom Case 2

## Agricultural Storage Centre Case

Low-income residents seeking to compel an agricultural storage centre to reduce excessive noise, vibrations and odours overcame financial and other obstacles in pursuing a legal remedy with government and NGO assistance.

### Relevant Aarhus provision

- Article 9(5)

### Key issues

- Financial barriers

### Case study details

**Cited case name:** Smith v. John Mann International Ltd

### Parties involved

**Plaintiffs:** residents

**Plaintiffs' representation:** Environmental Law Foundation (ELF), UK environmental law NGO (initial *pro bono* consultation: Richard Buxton)

**Defendants:** John Mann International Ltd, Lincolnshire agricultural storage centre operators

### Background facts

An agricultural storage centre caused serious disruption of quality of life of nearby residents, due to noise, vibrations and odours from lorries, resulting in sleep deprivation and ill health. Local residents were on a low income and could not afford to pursue a legal remedy.

### Procedural history

Local residents approached ELF, an NGO focused on improving access to justice in environmental matters through community development programmes and a network of environmental lawyers and technical experts. ELF put residents in touch with an environmental lawyer who provided a free initial consultation. With the lawyer's assistance, the residents applied for and were granted financial assistance from the government legal aid fund, to assist with obtaining further investigations and legal advice and representation in court. Residents commenced a nuisance action in Lincoln County Court.

### Final outcome

After being provided with assistance, the residents were successful in the nuisance action before Lincoln County Court. The operator paid damages and agreed to relocate.

### Related actions and campaigns

None reported.

### Access to justice techniques

A government-funded and administered "legal aid" scheme provided financial assistance for legal services to those with limited means.

In April 2000, the government's "legal aid" scheme was replaced by the Community Legal Service Fund of the Legal Services Commissions. Applications for public funding (formerly "legal aid") from the Community Legal Service Fund are subject to strict means and merits tests, and full assistance or partial assistance may be granted depending on an applicant's financial circumstances. At the end of a case, the Legal Services Commission is obliged to recover its costs as far as possible. The commission will first take account of any contributions paid by the funded client and any costs recovered from its opponent. After

that, it will recover any remaining deficit from any property or money recovered or preserved in the course of the proceedings. Formally, where a funded client is wholly or partially successful in recovering or preserving goods or property, a “statutory charge” is enforced that converts public funds from a grant into a loan.

The Community Legal Service Fund has certain rules, including:

- setting financial eligibility limits in terms of disposable income and disposable capital;
- requiring contributions from income and capital, if the disposable income and/or capital are within certain limits;
- defining the scope of the “statutory charge” on any money and property assets recovered or preserved with the help of funding; and
- limiting the award of costs against a funded client, known as “costs protection.”

In addition to qualifying financially, an applicant must also show that he or she has reasonable grounds for taking, defending or being a party to proceedings, and that it is reasonable in the particular circumstances of the case for public funding to be granted. There are also rules relating to the types of cases that are prioritised for funding. These currently do not include environmental issues, but do include health and social welfare.

### **Access to justice support from environmental law NGOs**

ELF provides information and advice on a wide range of environmental problems covering pollution, planning, conservation and health. It operates an advice and referral service providing free initial consultations and reduced cost legal and technical advice by environmental lawyers, scientists and academics. It also operates community development programmes aimed at helping communities to mobilise

themselves in the face of environmental challenges.

### **Case study analysis**

In general, the main obstacle relating to the government’s financial assistance scheme is that statutory criteria for funding are very strict. In ELF’s experience, very few people have been successful in obtaining legal aid for environmental cases. However, the new Community Legal Service Fund has introduced a new category of “cases of significant wider public interest,” subject to less stringent rules, which can be expected to cover more environmental cases.

The greatest obstacle faced by ELF is securing the funding to keep going. It survives on grants from grant-making bodies. Despite financial difficulties, it appreciates its independence from central and local government. It does work alongside the Citizens’ Advice Bureau, however, which is a network of government-funded local advice centres for citizens, providing free general legal advice. Citizens’ Advice Bureau advisors sometimes refer their clients with environmental problems to ELF.

In this case, the residents’ financial obstacles were overcome by the assistance of ELF and the availability of government financial assistance. Residents faced additional obstacles in relation to the unhelpful conduct of the local authority over licensing hours, the local government ombudsman and the planning authority. In all, these obstacles were overcome with ELF’s support and the perseverance of the environmental lawyer.

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# United States Case 1

## The Telephone Case

Citizens challenged a government environmental impact statement (EIS) recommending the chemical spraying of invasive species on the basis of “plain language” requirement.

### Relevant Aarhus provisions

- Article 9(2) and (4)

### Key issues

Review of public participation in decision-making on specific activities (insufficiency of EIS)  
Financial and other barriers (costs of expert witnesses)

### Case study details

**Cited case name:** Oregon Environmental Council v. Kunzman, 817 F.2d 484 (9th Cir.,1987)

### Parties involved

**Plaintiff:** Residents, South Salem, Oregon (residents)

**Plaintiffs’ representation:** Oregon Environmental Council

**Defendants:** Oregon Department of Agriculture; US Department of Agriculture

### Background facts

The gypsy moth is a European insect brought to the US more than 100 years ago in a misguided attempt to create a domestic silk industry. Unfortunately, the moth escaped from a laboratory in Massachusetts and, because it had no natural enemies on the North American continent, exploded in population and damaged trees — often exfoliating entire tracts of forest and causing millions of dollars in damage. Since its release, officials tried multiple methods

to prevent a westward advance — from fire to bombing areas with airplane-loads of pesticide chemicals. Nothing worked.

Finally, a few gypsy moths arrived in Oregon on the west coast of the US, a state where the timber industry had long been a major part of the economy. The US government planned to spray with the insecticide Carbaryl (Sevin), despite the failure of the insecticide to work elsewhere. A group of residents from South Salem, Oregon (including a family with chemically sensitive children) sought to stop this chemical spraying and to push the government to use biological control methods instead.

In their legal action, the residents were represented by the public interest legal organisation, Oregon Environmental Council (OEC).

### Procedural history

Residents filed a complaint in the US Federal District Court for Oregon. In the complaint, the residents asserted that the EIS prepared by the US Department of Agriculture (USDA) in support of spraying was inadequate in two ways:

- 1) It failed to discuss the health risks of the pesticides adequately.
- 2) The language used in the EIS was too complicated and hyper-technical for citizens — or even officials in charge of decision-making — to understand.

On the issue of language, US regulations require that an EIS must be written “in plain language, understandable by an ordinary person.” At trial, “readability experts,” trained to assess the years of education needed to understand a document, testified that the average reading level in the US is equal to the sixth year in school or about 12 years of age. (Oregon was higher at eight years as the reading ability level). A typical paragraph in the EIS, however, required 17 years of formal education to be understood — equal to a post-graduate degree.

In cross-examining an author of the EIS, OEC asked the author to answer how many people would get cancer from the spray programme by referring to the risk assessment contained in the EIS. The author was unable to answer from the text without consultation, despite the fact that he wrote the assessment. His ultimate response was, "If I had 15 minutes and a calculator, I could give you the answer!"

Based on this testimony, the district court ruled in favour of the residents, holding that an EIS that could not be understood by the chairperson of the Harvard Physics Department without 15 minutes and a calculator could not be said to be written "in plain language."

Initially, OEC faced financial difficulties in gathering the necessary experts to testify, but these difficulties were overcome (see below).

By its ruling, the US District Court in Oregon prevented the use of the chemical insecticide Carbaryl for control of the gypsy moth until new documents could be prepared that were legally adequate. Since the insects were about to emerge from their cocoons, there was no time to delay.

The government appealed this decision before the US Federal Court of Appeals. The Appeals Court affirmed the lower court ruling in favour of the residents.

### Final outcome

After the US Court of Appeals upheld the lower court decision, the government reluctantly decided to spray with the biological insecticide *Bacillus thurengiensis* (B.t.). One year later, the USDA proudly issued a press release, praising its own judgement and decision-making in the use of B.t. to control the gypsy moth. It proclaimed that the biological control programme had been the most successful in history.

### Related actions and campaigns

Residents organised a media and political campaign against the spraying.

### Access to justice techniques

A lawsuit was filed in the US District Court in Oregon.

### Case study analysis

This case reveals a problem common to environmental decision-making — highly technical language preventing citizen involvement and understanding. Under US law, the EIS is designed to be a means by which the public can engage in the decision-making process and later understand how an activity may affect their health and activities.

When the language of an EIS is so technical that it cannot be understood by the average citizen, it has the same effect as having not been conducted. In terms of access to justice, being able to understand the relevant laws and guidelines is as important as their actual development.

The residents also had to overcome financial barriers in this case. Several experts were willing to testify but could not afford to go to Oregon, and the residents could not afford to pay their hourly rates. The federal judge proposed that necessary witnesses testify by long-distance telephone instead of travelling to Oregon. The government opposed this, contending that cross-examination must be done in person, but the court held that the quality of a scientist's testimony and evidence has little or nothing to do with how his face or body language appears during a court appearance. Consequently, arrangements were made for a "telephone trial" in which nine of OEC's 11 witnesses testified by telephone. The clerk of the court set up a speaker telephone in the middle of the courtroom. When it was time for a witness to be called, the witness gave an oath of truthfulness as usually done when present in court in person. Lawyers for each side then asked questions of the witnesses.

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## Part III: Endnotes

1 The guiding statute on injunctive relief, Civil Procedural Code of RA, Art. 97 states that the Court, through solicitation of an interested person, undertakes remedies (injunctive measures) to ensure a lawsuit, and should take such matters where the failure to do so would make impossible or more difficult the enforcement of a judicial act. The guarantee of a lawsuit is permitted in any stage of a court procedure. As a guarantee of a lawsuit the civil code stipulates that the Court may prohibit the defendant from doing some actions.

2 The Council of State is the main administrative court in Belgium. It judges the legality of administrative acts (individual and regulatory), and has the power to *annul* an illegal act. Since 1989/1991 (two laws were adopted, the latter expanding the powers of the Council of State), the Council of State also has the power to *suspend* an act, pending the outcome of the annulment procedure.

3 A.S.B.L. or *association sans but lucratif* is a non-profit organisation registered under Belgian law.

4 Belgium is a federal state, consisting of three communities and three regions. Environmental competences are to a large extent attributed to the regions.

5 The law merely states that the plaintiff must have an interest, without specifying the characteristics of that interest (art. 19 of the co-ordinated laws on the Council of State).

6 As indicated above (note 1), the Council of State did not have the power to suspend administrative acts until 1989/1991.

7 Supreme Court, 25 October 1985, *A.S.B.L. Neerpede blijft vs. Commune of Anderlecht*.

8 As indicated earlier, the Council of State did not have the power to suspend administrative acts until 1989/1991.

9 But some inferior civil courts grant access to justice to environmental organisations to protect their procedural rights (right to participate; access to justice in front of the Council of State) if the adverse party does not assert a 'proper' (substantial) right.

10 *Referes* is the normal civil emergency procedure, referred to above, Belgium Case 1, point 4, as opposed to the "special" procedure set in place for environmental organisations; cf. above introduction to the present case.

11 The Council of State referred implicitly to its case law of August 11, 1989, n°32.953, *Wellens et al.*, according to which national environmental organisations may have a sufficient interest in challenging an administrative act likely to threaten a rare protected species.

12 It should be noted, however, that the frog in question is protected under Walloon law.

13 Extraordinary legal remedy allows anybody to seek review of alleged violations. This is done as an alternative to claiming an "action in the public interest," because appellate bodies can easily refuse the latter claim.

14 Constitution of Georgia, Article 37: 3) Everyone has the right to live in a healthy environment and use natural and cultural surroundings. Everyone is obliged to protect the natural and cultural surroundings; and 5) Individuals have the right to complete, objective and timely information on their working and living conditions.

15 Law of Georgia on Environmental Protection, article 6:

Citizens are entitled to: a) live in an environment that is harmless (safe) for his or her health; b) use the natural surroundings; c) obtain the full, objective and timely information on the state of the environment, where he or she lives; and f) take part in decision-making process and in the examination of this decision in the scope of environmental protection.

16 According to VwGO §48 paragraph 1, no. 5, the Higher Administrative Court [VGH] has jurisdiction in the first instance for disputes concerning development permit procedures for waste combustion plants, both in the case of actions for annulment and in the case of applications for interim injunctive relief.

17 In examining legal claims, German courts generally distinguish between an examination of admissibility and an examination of justification. First, the court investigates the admissibility of an action or other applications. Only when the charge is found to be admissible will the court investigate the justification of the action or application (i.e. the substantive legal situation). As such, access to justice depends upon this examination of admissibility. It comprises certain formal requirements, such as the competence of the court, and in particular, the right of action/right to apply. The right of action or right to apply (§42 paragraph 2 of the Code of Administrative Procedure [VwGO]) is only valid if the plaintiffs are asserting the infringement of their own rights, and such an infringement of rights is at least deemed plausible. The plaintiff must assert the infringement of a subjective public right which, in addition to protecting the interests of the general public, must at least aim to protect the plaintiff's own rights.

This approach (limiting the judicial review to an infringement of the plaintiff's own rights) has certain implications, not only within the context of examining admissibility, but also in the examination of justification, in that it determines the extent of examination by the court (control breadth): The court confines itself to examining those provisions which protect third parties. In the case of actions for annulment, as in this instance, the court will annul the contested administrative act "provided the administrative act is unlawful and the rights of the plaintiff are thereby infringed" (§113 paragraph 1 of the Code of Administrative Procedure [VwGO]). Infringements of rules not designed to protect the plaintiff will be disregarded and will not lead to the annulment of the official decision. This is of particular significance for infringements of procedural provisions that, in many cases, are



not designed to protect individuals but instead serve solely to protect the interest of the general public in a meaningful and expedient organisation of proceedings.

The limitation of access to justice and the narrow scope of examination contrast with the high density of control (control depth) of the judicial review. The intensity of the administrative law review is comparatively high in Germany. It even allows the court, in some cases, to review discretionary or prognostic decisions by the administration, whereby limits and other standards specified in administrative provisions are often used as yardsticks (cf. also 6A(3)).

**18** If approximate values are available for the interests of the plaintiff, these shall be decisive. The general figure of DM 8,000 cited in §13 of the Court Costs Act [GKG] may only be used as a basis in the absence of approximate values. A working party of judges has prepared a catalogue of guideline values for jurisdictional amounts, which is updated and amended at regular intervals (printed in: *Redeker/von Oertzen, Verwaltungsgerichtsordnung - Kommentar*, 13th edition, Stuttgart 2000, §165, margin number 19ff.)

**19** Calculated in accordance with § 11, paragraph 2 and in conjunction with Annex 1 to § 11, paragraph 1 of the Court Costs Act [GKG]

**20** In Germany, to date, altruistic legal action by an association has only existed at Länder level (see point 1 below) (i.e. only in order to appeal against measures by the Länder administration). At the Federal level, no altruistic legal action by an association has thus far existed under valid law (see point 2 below); at present, the Federal Nature Conservation Act only regulates the rights of recognised nature conservation associations to participate in certain administrative procedures and measures which involve impairment of nature and landscapes, and the prerequisites governing the recognition of such associations (§29 of the Federal Nature Conservation Act [BNatSchG]). According to §29 of the Federal Nature Conservation Act [BNatSchG], an association is recognised as having the right to participate in development permit procedures if (1) the main purpose of the association, as defined in its Articles of Association, is to promote, for non-profit purposes and not for a limited period of time only, the cause of nature and landscape conservation; (2) its scope of activity covers at least the territory of one of the Federal Länder; (3) there is sufficient evidence that the association is able to pursue its objectives adequately (based on the type and scope of its activities, as well as on its members and capacity); (4) it is exempt from corporate income tax because of its non-profit character; and (5) entry is open to anyone who supports the association's objectives.

However, according to a draft Act to Amend the Federal Nature Conservation Act [BNatSchG] (see point 3 below), an (altruistic) legal action by recognised nature conservation associations will be introduced at Federal level. As such, in future, and subject to certain requirements, recognised organisations will also be able to take legal action against various measures, including those of the Federal administration, with the claim that the provisions of environmental legislation are infringed.

Point 1: Rights to legal action by an association are provided in the following Länder acts: Berlin (§39a of the Nature Conservation Act [NatSchG]), Brandenburg (§65 of the Nature Conservation Act [NatSchG]), Bremen (§44ff. of the Nature Conservation Act [NatSchG]), Hamburg (§41 of the Nature Conservation Act [NatSchG]), Hesse (§36 of the Nature Conservation Act [NatSchG]), Lower Saxony (§60c of the Nature Conservation Act [NatSchG]), Rhineland-Palatinate (§37 of the Landscape Management Act [LPflegeG]), Saarland (§33b of the Nature Conservation Act [NatSchG]), Saxony (§58 of the Nature Conservation Act [NatSchG]), Schleswig-Holstein (§51c of the Nature Conservation Act [NatSchG]), and Thuringia (§46 of the Nature Conservation Act [NatSchG]).

Point 2: Additionally in this context, associations are authorised to take action if they themselves are the owners of property — for example, in the area of impact of a (potentially) environmentally harmful plant — even if the property was acquired for the sole purpose of obtaining the right to take action.

Point 3: <http://www.bmu.de/fset800.htm>.

**21** In the case of development permit procedures, there is no need to lodge an appeal before bringing a legal action (§74 paragraph 1, sentence 2 in conjunction with §70 of the Law on Administrative Procedures [VwVfG]). This is

an exception to the normal procedure, whereby the lodging of an appeal (§68ff. of the VwGO) is generally required before bringing a legal action.

**22** Renewed participation is also necessary in the case of an unaltered plan if the planning authority feels it necessary to conduct fresh investigations concerning nature conservation, integrate the results into the procedure, and base its planning decision on this — cf. Federal Administrative Court ruling [BVerwGE] 87, 62, 70ff.

**23** According to §22 of the Brandenburg Nature Conservation Act [BbgNatSchG], territories may be designated as conservation areas by means of legal ordinance. According to the provisions of the ordinance, prohibited actions include those that alter the character of the area, damage the ecological balance, disfigure the landscape, impair the enjoyment of nature or otherwise contravene the purposes of special protection. The legal ordinance determines the subject of protection, the protective purpose, and the orders and prohibitions required in order to attain goals of protection.

Where the territory has not yet been designated a conservation area but is intended to be designated as such, an area may be temporarily protected for a period of three years, which may be extended by one year, if the intended protective purpose is deemed to be threatened by changes. According to the more detailed provisions of the legal ordinance or court order, any actions deemed likely to alter the subject of protection permanently are prohibited in the protected area (§27 and 28 of the Brandenburg Nature Conservation Act [BbgNatSchG]). However, an exemption from the prohibitions under the Brandenburg Nature Conservation Act [BbgNatSchG] may be issued subject to certain preconditions (§19 of the Brandenburg Nature Conservation Act [BbgNatSchG]).

In addition, ordinances designating conservation areas may allow for licenses for certain activities within an area. However, the licence may be issued only if the intended action does not contravene the intended protective purpose, and is insignificant (§19 paragraph 2 of the Brandenburg Nature Conservation Act [BbgNatSchG]).

**24** According to §29 of the Federal Nature Conservation Act [BNatSchG], an organisation is recognised if (1) the main purpose of the society, as defined in its Articles of Association, is to promote, for non-profit purposes and not for a limited period of time only, the cause of nature and landscape conservation; (2) its scope of activity covers at least the territory of one of the Federal Länder; (3) there is sufficient evidence suggesting that the association is able to pursue its objectives adequately (based on the type and scope of its activities, as well as on its members and capacity); (4) it is exempt from corporate income tax because of its non-profit character; and (5) entry is open to anyone who supports the association's objectives.

**25** German law holds that only small projects used for public purposes can exempt land otherwise designated as protected. The land in question failed on both counts.

**26** A right of standing for associations does not exist at the federal level in Germany. However, the draft of federal natural law suggests possible standing in matters involving federal projects (e.g. federal highways and waterways).

**27** Given the cost and scope of the case, NABU and BUND signed a contract of collaboration according to which BUND would be the only party officially bringing the suit. The public, however, perceived both groups as parties to the suit.

**28** Under German law, the Federal Administrative Court has jurisdiction over cases concerning traffic projects in the context of reunification.

**29** Under German law, only *development projects* involving federal waterways require public participation.

**30** As evident in the The Nature Reserve Case, however, a successful ruling that the proceedings were unlawful in the absence of public involvement will often void the decision made at the proceedings.

**31** Joined as a “friend of the defendant,” the State Highway Management Company was the developer and financial manager of the proposed construction project. This status is used for parties who have a legitimate interest in the outcome of the proceeding. The court must make a resolution on accepting someone as a friend of the plaintiff, or of the defendant.

32 In the instant matter, although it involved a highway project, an EIA was not required prior to construction because the law on EIAs only entered into force after the filing of the first application.

33 In addition to the EIA law, NGO standing may be granted pursuant to article 98 paragraph 1 of the Environmental Protection Act, which states that “associations formed by citizens for the representation of their environmental interests and other social organizations not qualifying as political parties or interest groups - and active in the impact area - shall be entitled in their area to the legal status of being a party to the case in environmental protection state administration procedures”.

34 Separately, the EPAC began proceedings against the Union of Evangelist Churches, which had not undertaken any construction activities at the time of the trial.

35 EPAC surmounted this obstacle by taking a subpoena from the judge containing a signature line and bringing it to the defendant, thereby forcing the defendant to sign and authorise the case to begin.

36 The only exception is if the statute is contrary to an international agreement, including European law.

37 Under the Polish Code of Administrative Procedure, individuals can participate in proceedings as a matter of law if they are a necessary party, or have a legal interest.

38 Relevant legislation includes articles 42 of the RF Constitution, chapter 24 of the RF Civil Procedural Code; articles 11-13 of the RF Law on Environmental Protection; and State Environmental Expertiza Rules (regulated by the Federal Law on Environmental Expertiza, adopted by the Russian Parliament in 1995).

39 See Jon Gaulsaa, An overview of a breach of fundamental human rights and internal Russian law. Working paper, University of Oslo, Norway, 1988, <[www.bellona.no/imaker?id=10052&sub=1](http://www.bellona.no/imaker?id=10052&sub=1)>.

40 The complaint was based on articles 42, 24, 28 of the RF Constitution; on articles 11-13 and 40-42 of the RF Law on Environmental Protection; on chapter 24 of the RF Civil Procedural Code (right to appeal to court decisions or actions of authorities that violate citizens' rights).

41 This case study was drafted with input by Carlos Martinez-Camarero and Luis Oviedo-Mardones, *pro bono* lawyers of Ecologistas en Accion.

42 The company no longer operates in Spain.

43 Ms. Sanchis-Moreno drafted this summary, using information from <[www.nodo50.org/ecoloand/aznal3.htm](http://www.nodo50.org/ecoloand/aznal3.htm)> and <[www.seo.org/es/campanias/doniana.html](http://www.seo.org/es/campanias/doniana.html)>. Information was also supplied by Carlos Martinez-Camarero of Ecologistas en Accion.

44 According to articles 4 and 11 of the law of Ukraine on Sanitary and Epidemiological Welfare of the Population, citizens have a right to conditions of home and rest that are safe for health and life. Accordingly, proposals for the expansion and refurbishment of facilities are subject to compulsory sanitary-epidemiological examination. Under article 15 of the same law, government officials are required to take into account the need to maintain living conditions most favourable for the improvement of public health in making decisions regarding expansion and refurbishment of facilities. Finally, article 5 of the law of Ukraine on City Construction requires that the interests of citizens who use buildings and spaces adjacent to or a part of the construction area must be provided for during the approval process.

45 The issue of interim relief had not been referred to the ECJ and was not addressed by the Court. The Advocate-General noted that, despite its impact on the enforcement of national provisions designed to implement Community environmental law, this issue had not been referred for guidance to the ECJ and advised the Court not to address it (paragraph 10 of the opinion).

46 Referring to C435/92 *Animaux Sauvages* and other cases on point, ECJ noted that article 2 of the directive, referring to economic interests, did not constitute an autonomous derogation in terms of designating SPAs. The Court noted that, having regard to its judgement in *Leybucht Dykes*, article 6(4) of the habitats directive (which by virtue of article 7 of the habitats directive applied to SPAs) widened the grounds for encroaching on the area of a designated SPA to include economic and social grounds. It also noted, however, that article 7 of the habitats directive only amended article 4(4) of the wild birds directive and had not amended paragraphs (1) and (2) of article 4. Thus, economic requirements did not enter into consideration at the stage of classifying an SPA and could only be taken into account in the circumstances set out in article 6(4) once the site was already designated.

47 Reported at [1975] 2 WLR 316.

48 Reported at [1987] 1 WLR 670, see page 680.







# Appendices



# Appendix A

## Report of Tallinn Workshop on Access to Justice in Environmental Matters under the Aarhus Convention

text taken verbatim from a united nations document

### **Economic and Social Council**

Distr. General

CEP/WG.5/2001/5

3 October 2001

Original: English

### **Economic Commission for Europe**

### **Committee on Environmental Policy**

Working Group for the Preparation of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

(First meeting, Geneva, 28-30 November 2001)

## **Workshop on access to justice in environmental matters under the Aarhus Convention**

### **Introduction**

1. At their second meeting, the Signatories to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters established a Task Force on Access to Justice, to be led by Estonia, to support the implementation of the third pillar of the Convention (CEP/WG.5/2000/2, para. 47). Following the suggestion of the Signatories, the Task Force held a workshop in Tallinn, Estonia on 17-19 September 2001. The Governments of Finland and the Netherlands provided financial assistance for the workshop to match the Estonian funds.
2. The workshop was attended by 52 participants, acting in their personal capacity, from governmental and non-governmental organizations from the following coun-

tries and organizations: Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Germany, Kazakhstan, Latvia, Lithuania, Netherlands, Romania, Slovakia, Sweden, Ukraine, United Kingdom, Uzbekistan, Yugoslavia, European Commission, American Bar Association Central and Eastern European Law Initiative (ABA/CEELI), Regional Environmental Center for Central and Eastern Europe (REC), the European ECO Forum and the Environmental Law Association of Central and Eastern Europe and Newly Independent States (GUTA Association), the American Embassy in Estonia, Estonian Green Movement and Coalition Clean Baltic.

3. Mr Allan Gromov, Deputy Secretary General, Ministry of the Environment, Estonia, welcomed the participants to the workshop. Estonia had been working for over two years to prepare the ratification of the Convention in August 2001 with the assistance of the Government of Denmark to whom Mr Gromov expressed his gratitude. He also thanked the Governments of Finland, the Netherlands and the United Kingdom and ABA/CEELI who had contributed to the workshop and the preparation of the handbook and expressed his best wishes for a successful workshop.
4. Ms Sofie H. Flensburg, from the secretariat, gave a brief update on the status of the Convention and the current developments under its auspices. Seventeen countries had ratified the Convention which would enter into force on 30 October 2001. The first meeting of the Parties would be likely to take place during autumn 2002, although no decision had been taken so far. A preparatory meeting for the first meeting of the Parties had been scheduled for 28-30 November 2001 to which the results of the workshop would be reported.

5. The representative of the lead country for the Task Force, Ms Rita Annus, Estonia, reminded the workshop of the mandate given to the Task Force by the second meeting of the Signatories. The Task Force should focus on good practice and should provide a forum for exchange of practical experience – it should not engage in refining the legal framework of the Convention. The aim of the workshop would be to provide an opportunity for sharing practical experience and to refine the concepts in the draft handbook. In addition, there would be a possibility to discuss possible further activities of the Task Force. She also introduced the agenda for the workshop and some questions that had been prepared in advance of the workshop.
6. As a representative of the main donor for the project on the draft handbook on access to justice, Ms Jayne Boys, United Kingdom, raised some points of importance to the UK. She emphasized the support of the UK to the Aarhus Convention and to the handbook project. Sharing practical experience on what works best had proven to be a good method in the case of the Newcastle Handbook on public participation and Ms Boys expressed the hope that the actual cases in the draft handbook could be a useful basis for discussions at the workshop and that these discussions would help in shaping the handbook. She thanked the people who had contributed to the drafting process and invited other people to submit comments and additional material for the finalization of the handbook.
7. Mr Hannes Veinla, Chair of the Environmental Law Department, Faculty of Law, Tartu University, Estonia, gave a presentation outlining the issue of access to justice in the Aarhus Convention. He focused on the characteristic features of article 9 and the purpose of access to justice both in general and in the context of the Aarhus Convention. He then raised some of the key issues of implementation, such as institutions, standing, remedies and costs. He concluded by emphasizing that every person should have access to a simple, brief and effective procedure for obtaining protection by a court or an alternative body against acts and omissions that affect any of the rights established under the Convention and national law.
8. Mr Stephen Stec, REC, coordinator of the project of the handbook, gave an introduction to the process of the development of the draft handbook, underlining the fact that the time available to prepare the draft had been very limited and that a lot of editing and reviewing was still necessary. The draft handbook was in two parts, an analytical part and an appendix of case studies. He explained the process for the collection of case studies – 43 cases in total had been submitted – but also emphasized that more countries needed to submit cases and that the cases also needed more work. He expressed his gratitude to the partner organizations in the project, namely ABA/CEELI, the Environmental Law Alliance Worldwide (E-LAW), GUTA Association and European ECO Forum, and to others involved in the work of the Task Force.
9. Ms Cairo Robb, United Kingdom, reiterated the mandate of the Task Force which emphasized that it should focus on practical implementation and should provide models, concrete solutions and problem-solving approaches in the implementation of article 9. She highlighted some parts of the handbook such as the chapter on access to justice in public participation cases, the section on injunctive relief and the part on SLAPP suits. As to the case studies collected for the purposes of the draft handbook, article 9, paragraph 3, seemed quite lightly covered whereas many cases illustrated issues in relation to article 9, paragraph 2. She emphasized that the workshop should focus on the lessons that could be learned, both from the case studies and from exchanges of experience, which could then be reflected in the conclusions of the workshop.
10. The workshop organized its discussion in three smaller groups each facilitated by one of the participants. The smaller groups based their discussions on the draft handbook and on the questions which had been circulated in advance of the workshop. After each session, the smaller groups reported their conclusions back to the plenary.

## I. Good practices identified

11. The main conclusions of the workshop are reflected below. In the discussions of the different topics, it became clear, taking into account the broad geographical scope of the UNECE countries, that different countries had different legal systems and that the contexts in which access to justice under the Aarhus Convention needed to operate were diverse in terms of legal and democratic traditions, as well as social, cultural and economic conditions. Therefore any conclusions on what can be learned from examples raised in the discussion in the workshop need to take this into account. Furthermore, even though the workshop had a wide representation of UNECE countries, it is likely that given the short time available, the need to simplify the examples and problems of language and terminology, not all existing examples of good practices were actually discussed and presented at the workshop itself. The following conclusions should be considered in the light of these limitations.

12. These conclusions are therefore a list of good examples that countries can use as a starting point when looking for examples of experiences in a particular field. They can then investigate in more depth how the example works, for instance by taking up bilateral contact with the workshop participant from that particular country. Furthermore, where concrete examples exist to illustrate the good practices suggested, or other good practices, these should be provided for the final version of the handbook, if they are not already there. Efforts should be made to ensure that all good practices listed below are adequately described in the final version of the Access to Justice Handbook.

## A. Procedures — Article 9, paragraph 1

### Review bodies

13. The question of the body to which a member of the public can appeal a refusal of access to information was considered in several sessions of the workshop. In the United Kingdom (England and Wales) a Freedom of Information Commissioner had been appointed to consider cases of denial of full access to information. The Commissioner was open to any person and his or her decisions were binding on the public authorities in question. In Estonia, there was a Data Protection Inspectorate which was an independent body providing a procedure which was quick, low cost and easily accessible. In Slovakia, a new Commission for Environmental Information had been established under the Ministry of Environment to consider these types of cases; it had independent members of both the judiciary and NGOs. In Ukraine, there were expeditious appeals procedures for these cases coupled with the possibility of claiming disciplinary penalties. (See also paras. 33 to 39 below on Review Bodies.)

### Time frames

14. Concerning good practices for preliminary reconsideration and administrative review procedures with respect to cases concerning refusal of access to information, the question of time frames was considered. The obligation of the European Parliament, Council and Commission to internally reconsider an application for access to information within 15 days of the submission of the complaint (confirmative application) was considered to be good practice. Furthermore, a number of countries had one month in general for administrative (non-judicial) reviews; this was the case in the Czech Republic, Estonia, the former Yugoslav Republic of Macedonia and also other countries.
15. Concerning judicial review, six months from the appeal to the judicial system and until the final decision by the

court, as is the target in England and Wales, seemed to be a good example of a timely judicial procedure. Another suggested good practice would be to reduce deadlines for refusal of information to allow the applicant to go forward with the complaint or appeal as soon as possible.

### General

16. From the discussions, it seemed that the non-judicial review mechanisms were more efficient, timely and cheaper than court procedures, but that the court proceedings should be kept in place.

## B. Procedures — Article 9, paragraph 2

### Standing

17. There was a variety of ways in which the countries had dealt with the question of standing in relation to cases falling under article 9, paragraph 2, consistent with the Convention's objective of providing wide and effective access to justice. In Ukraine, every citizen could complain about alleged violations of rights under article 9, paragraph 2, which seemed to be good practice. In the United Kingdom (England and Wales), the determination of 'sufficient interest' is left to the discretion of the court, which can interpret this flexibly enough to include not only NGOs, but also other citizens' organizations and residents and community groups as well as individual citizens.

### Review bodies

18. In Denmark, the Environmental Appeals Boards were established by law. These Boards were independent from the Ministry, delivered what were considered to be high quality binding decisions and were therefore considered to be an example of good practice. (See also paras 33 to 39 below on Review Bodies.)

## C. Procedures — Article 9, paragraph 3

### Standing

19. For an NGO to have standing in cases under article 9, paragraph 3, in certain countries such as Belgium, certain criteria should be fulfilled, but once an NGO had proven to fulfil these - for instance that protection of the environment should be the objective stated in the charter or the bylaw of the NGO - it would have standing in all environmental cases.
20. *Actio popularis* existed in some countries, such as the Netherlands and Spain. The practical experiences with

*actio popularis* were that it was rarely used in Spain but used quite often in the Netherlands.

### Constitutional rights

21. In many countries, for instance Hungary, Belgium, Czech Republic, Kazakhstan, the former Yugoslav Republic of Macedonia, Slovakia, Spain, Yugoslavia and Ukraine, the public had a constitutional right to a healthy environment and in some countries also an obligation to protect the environment. Following from this constitutional right and, where applicable, obligation, there was a right of standing in the constitutional court in cases of alleged violation of the constitutional right.

### Criminal proceedings

22. In a few countries, like Spain and the United States, it was possible for NGOs to challenge companies for violation of the environmental legislation directly in criminal proceedings. In the case of Spain, the NGO might have to join the public prosecutor in the case but further investigation was required to clarify this point.

### Citizen enforcement

23. In the UK, while the main responsibility for enforcement lay with the authorities, in cases of nuisance, legislation provided that where the local enforcement authority had not acted, any person may ask the local court to make an order requiring a polluter who was causing a statutory nuisance to abate the pollution. If the polluter failed to comply with the notice, this was a criminal offence.

## D. Remedies

### Injunctive/interim relief

24. Rules and practices on injunctive relief seemed to be very different in different countries. Examples of good practice were identified in the Czech Republic and Germany, where a complaint in relation to a license or permit automatically suspends the decision taken by the public authority. In other countries, such as Hungary, the United Kingdom and the United States, injunctive relief is possible in certain circumstances. In some countries, the criteria are specified in the legislation, whereas in others the criteria were developed in court practice.
25. In Germany, no bond was required to obtain an interim injunction and the defendant was not entitled to sue for damages even if they won the case. In other countries, such as the United States and the United

Kingdom, in environmental cases in the wider public interest, the court had discretion to require only a nominal bond (for example 1 USD) or no bond at all.

### Timely procedures

26. To prevent lengthy court proceedings, case management techniques and timetables to be followed in court cases had been developed in some countries, like the United Kingdom (England and Wales), the United States and the Netherlands.

### Mechanisms to avoid abuse of the legal system

27. In some countries, such as the United Kingdom (England and Wales), there were generally very strict time limits for bringing a case to the court where the case involved a challenge to a decision of a public authority. A court claim would have to be brought within three months after the final decision of the public authority.

### Damages

28. The question of damages was considered to be relevant in some cases. In Ukraine, there was a regulation on how to calculate damages, whereas in most countries, it was left to the discretion of the judges/courts.
29. The practice in Ukraine and Russia to provide for moral damages in environmental cases was considered to be a good example of an effective remedy of redress.

### Enforcement

30. Mechanisms to enforce court decisions were considered to be essential. In Belgium (Flanders), there was a possibility to issue instant penalties for non-compliance with court decisions and in United States, each day of violation of the court decision was considered to be a separate criminal offence of contempt of the court.
31. Imposing criminal responsibility on government officials who concealed environmental information, as for example in Russia and Kazakhstan, was considered to be an effective remedy as regards access to information.
32. Strict liability of entities carrying out hazardous activities was felt to be important because it shifted the burden of causation and was an appropriate allocation of the burden of risk. In some cases, strict liability was combined with requirements on operators to establish insurance funds or other financial guarantees to ensure that judgments against them could be enforced.



## E. Review bodies and other bodies

### Main review bodies

33. In most countries, the main review bodies under article 9, paragraphs 1 and 2, were the courts. However, some good examples of other independent and impartial bodies were mentioned in relation to article 9, paragraphs 1 and 2 (see paras. 13 and 18 above). In Sweden a specific Environmental Court had been established, which had jurisdiction in environmental law cases. Independence and impartiality of the main review bodies
34. The independence of review bodies other than courts of law was in most cases secured by the statute or the law by which the body had been established, e.g. the Danish Appeal Boards. Financial independence was secured by separate budgets for the bodies.
35. The independence of the courts was secured through the appointments procedures, providing job security for judges, (e.g. higher judges are appointed for life or until retirement, and may only be removed in exceptional circumstances), providing adequate remuneration of judges, ensuring independence of funding for the judiciary and the independence of the judicial hierarchy from the main decision-making government departments.
36. It was considered important that courts and other independent bodies operated transparently. This could include providing annual reports on their activities, including statistics on numbers and types of cases, and publication of their decisions, for example on the Internet.

### Reconsideration by a public authority

37. The existence of a reconsideration procedure was considered an important means to avoid or solve disputes at an early stage. Where a procedure for reconsideration by a public authority existed in the context of article 9, paragraphs 1 and 2, it seemed to be good practice that the administrative review would be performed by a different person than the one who made the decision in the first instance.

### Ombudsman

38. In most countries, and in the European Union, there was an ombudsman institution, which seemed to be good practice, even if during the discussions it became clear that the institution would be quite different in different countries. Usually, ombudsmen would be independent, appointed by the Parliament and only responsible to the Parliament. In most countries, everybody had the right to complain to the ombudsman. In some countries, like

Hungary, there were more ombudsmen dealing with different issues. Some ombudsmen dealt specifically with issues such as human rights and freedom of information. Other ombudsmen dealt only with cases of mal-administration. In some countries, e.g. Spain, the ombudsman would have to deal with all complaints whereas in others, they had the discretion to decide whether they wanted to address a specific case or not, e.g. in Denmark. While decisions of most ombudsmen were non-binding, the publicity given to ombudsman cases and reports could help to ensure that decisions of the ombudsman were taken seriously. However, the ombudsman in Moldova was able to issue legally binding decisions.

### Mediation

39. In some countries, mediation existed as an alternative to more formal action. While this was not suitable for all types of dispute, it could provide an accessible no or low cost option in some cases. Availability of mediation services could reduce the need for the use of more formal mechanisms for access to justice, such as litigation in the courts. This could be especially useful in local and neighbour disputes.

## F. Overcoming financial barriers

### Legal aid schemes

40. Most countries had legal aid schemes to assist individuals when they seek access to justice before the courts, which were considered to be a good means for overcoming financial barriers. These schemes could cover some or all of the following: initial investigation costs, court fees, attorney fees for advice and for representation in court, and expert fees. The assistance could be financial or could be in the form of direct provision of services. In most countries, the assistance was only available to individuals, and usually would depend on the financial situation of the applicant. In some cases, the assistance would also depend on the chances of a successful outcome for the plaintiff in the court case. However, a good example of extended access to legal aid seemed to be the German system, where NGOs could also apply for financial assistance in higher courts and the supreme court without having to show chances of a successful outcome.
41. Even where legal aid schemes were available, it was considered important to provide other mechanisms to overcome financial barriers which still existed for those not eligible for legal aid.

### Initial investigation prior to court action

42. A robust state-run environmental regulatory and enforcement system could play a significant role in

investigation and information gathering prior to court actions. It was considered to be good practice that the implementation of the access to environmental information provisions of the convention enabled citizens to obtain such information at no or low cost.

### **Court fees**

43. In some countries, such as Spain, free access to courts was available in some cases, whereas in others, like the United States and Hungary, only a low nominal fee was necessary to start a case in front of the court, and in yet others, like the United Kingdom and Bulgaria, the court fee could be waived or reduced, *inter alia*, depending on the income of the plaintiff, even if the lawsuit was unsuccessful.

### **Attorney fees**

44. A practice of *pro bono* lawyers was quite developed in the US but less available in Europe. In Hungary and the Ukraine certain NGOs specialized in providing free legal advice in environmental cases. In some countries, certain NGOs always had the right to a free lawyer. In other countries, groups of lawyers existed to promote special types of cases, such as environmental cases. In some proceedings there was no requirement to be represented by a lawyer, and so attorney's fees could be avoided altogether. This was the case with the Danish Environmental Appeals Boards and the Netherlands Administrative Courts.

### **Expert fees**

45. Some good examples of how to overcome barriers posed by expert fees were identified. In Spain, a judge could decide that the court itself should cover expert fees. In one of the Spanish courts, a toxicologist had been employed directly by the court to help in technical matters. In some countries, it was left to the discretion of judges who should pay expert fees. The creation of new public interest networks and support for existing ones could help to reduce the need for and the cost of experts.

### **General support to public interest NGOs**

46. The provision of tax deduction incentives for private donations, as in Germany and the UK, was regarded as a good example of helping NGOs to overcome financial barriers in general, which in turn could have benefits on access to justice. In Spain, Hungary and the United States, there was a possibility of more favourable tax rules for public interest NGOs them-

selves. Some governments, for example Germany and the Netherlands, annually gave funds to NGOs, including environmental NGOs whose projects could lead to court actions. In some countries, the court could order that the fine of a polluting company be paid directly to NGOs with the objective of environmental protection; that was the case in Germany and Uzbekistan. Some participants in the workshop felt that under the Aarhus Convention, it should be the general objective to reduce fees or give free access to court to public interest NGOs.

### **Financial certainty and cost shifting**

47. In certain cases it was not just the absolute costs of bringing an environmental action that created a financial barrier, but also the uncertainty in relation to the costs – especially the risk of having to pay the other side's costs where fee-shifting was practiced. It was considered good practice to be able to provide more certainty from the outset to those bringing actions in the public interest. In Germany, for example, there were fixed maximums for the costs of certain types of actions. In the United Kingdom, it was possible for a judge to make a pre-emptive costs ruling at the outset of a case that the applicant bringing a case in the public interest would not be held liable for the other side's costs, even if the applicant were to lose.
48. At the end of a case, in some countries such as the United Kingdom and the Netherlands, the judge had a discretion to limit the amount of the other side's costs that a losing applicant would have to pay in the light of the nature of the case and the conduct of the defendant.

### **General**

49. A good practice to overcome financial barriers to access to justice in general was considered to be the use of non-judicial mechanisms as they were generally cheaper and less time-consuming. Good quality of administrative decision-making reduced the needs to go court and thus the number of court cases, which was likely to save costs for all parties.

### **G. Overcoming other barriers and other issues not addressed in other sessions**

#### **Capacity building**

50. Capacity building was identified in both smaller working group sessions and in plenary as key to good practice in implementing the access to justice provisions under the Convention. This could take the form both of capacity building at home, and in partnership projects

with other states. Partnership projects could be particularly important where states shared a reliance on a specific common natural resource. It was felt important that the needs of different target groups, such as judges and lawyers, government officials, NGOs and the general public were all addressed. Strengthening capacity in relation to access to justice under the Aarhus Convention would have a positive effect on other areas of law. It was noted that a lot of the elements necessary to increase the capacities were already available – what was needed was political priority and adequate resources.

### **Capacity building of government officials**

51. The handbook was considered to be addressed to government officials, whom it was intended to assist in identifying possible elements of good practice.

### **Capacity building of judges and lawyers**

52. It was felt that the knowledge of the judiciary and members of other review bodies should be improved through training and workshops on the issues liable to arise in environmental cases. One way of ensuring this was identified in Sweden, which had a specific Environmental Court whose judges specialized in environmental cases. What was important was that training and, where necessary, technical assistance were available to those judges likely to come across relevant cases. The UK system of justices clerks, who assist and provide advice to Magistrates, was presented as an example of a way of channeling environmental expertise into the judiciary. Training for lawyers was also considered to be good practice. This could be done in conjunction with university courses, and could involve students' participation in university environmental law clinics as in the Ukraine. It was also regarded as important that all lawyers had access to court decisions, and it was considered good practice for courts to publicise their decisions, and especially for Supreme Courts to publish all their decisions, for example on the internet as is done in Estonia, Russia and the United Kingdom.

### **Public awareness**

53. It was felt useful to share experience on public awareness campaigns, even if they concerned another topic. The use of electronic tools was emphasized as a good solution to reach the public. The public seemed not to be aware of their environmental rights in many countries. Statefunded public advice centres, such as the Citizens' Advice Bureaux in the United Kingdom and university law clinics existing in Estonia and the Ukraine, could be used to educate and assist the public in relation to their environmental rights. Good prac-

tice included strategies which took a long term approach to awareness-raising, to ensure that the effect of the awareness-raising campaign would be carried forward. For this reason it was important to take awareness raising seriously, to plan it carefully, and to involve NGOs and other community groups in spreading the message.

54. Fostering constructive relationships between the different actors was regarded as good practice. For example, in Kazakhstan, the Ministry of Natural Resources, the Parliament and NGOs had entered into a special agreement on the implementation of the Aarhus Convention and through this were able to disseminate information quickly through these outlets. Similar agreements had also been signed at the local level. In Georgia, the Environment Ministry held regular national and regional Saturday morning meetings with NGOs.

## **II. Next steps — future activities of the task force**

55. The participants at the workshop felt that it was important that the work of the Task Force continue, and discussed what the possible next activities should be in terms of finalization of the handbook and other activities.

### **Handbook**

56. Concerning the handbook, it was agreed that the draft handbook should be finalized taking into consideration the findings of the workshop. The lead country, Estonia, would take the lead in the process of finalization. Participants would be invited to submit written comments on the handbook to Estonia and would also be invited to submit more details on specific identified good solutions to certain problems. The deadline for submission of comments would be communicated to the participants as well as to the Focal Points to the Aarhus Convention.

### **Questionnaire**

57. One of the findings of the workshop was that the legal systems throughout the UNECE region were very different and that it was therefore quite difficult to assess the usefulness of the models and examples identified at the workshop and in the draft handbook. Taking this into consideration, the lead country informed the participants of its intention to circulate a questionnaire to all countries which would help to gather general information on the legal systems of access to justice in the different countries. The questionnaire would be simple, easy to complete and not designed with the inten-

tion of conducting an in-depth analysis of the legal systems. The survey would provide background material which would help in the understanding of the differences in legal systems in the region.

### **Other proposed activities**

58. On the basis of the understanding that the handbook would be mainly addressed to government officials and others involved and responsible for the implementation of the Convention, it was considered to be important for the Task Force to also assess and address the needs of other target groups such as the public, lawyers and judges.
59. Some participants felt that a next step could be for each country to do an analysis of its legal and practical systems in place on access to justice. Such an analysis

could use the findings of the workshop and the handbook to identify priorities for improvements.

60. The lead country invited all participants to consider further financial and other contributions to the future work of the Task Force. Some participants indicated that they would look into the possibility of providing such support.

## **III. Closure of the workshop**

61. The participants expressed their gratitude to the lead country for the organization of the workshop, and the lead country thanked all participants, facilitators, rapporteurs, the interpreters and the secretariat for their efforts.

# Appendix B

## Other cases and background materials

### Czech Republic: Parallel public participation in the national EIA system

Source: Pavla Jindrova, Centre for Community Organising, Plzen

*Editor's note: An alternative source of authority can actually be established when members of the public set up their own parallel public participation proceedings that would meet high standards of fairness and accuracy. This can have a major impact on the quality of the official process, acting as a control mechanism that works in many ways like traditional access to justice mechanisms.*

#### Parallel public participation in EIA — justification

A variety of domestic and international studies indicate that the Czech EIA Act (No. 244/92 Coll.) does not require effective public participation in the EIA procedure. In the Czech EIA practice several limitations on public access to full participation can be found.

#### **1. There is no public debate about the scope of EIA documentation (scoping).**

The content of EIA documentation — alternatives and impacts to be studied when assessing the proposal — is determined by the developer (developer decides on alternatives to be studied) and the EIA expert hired by the developer (deciding on the impacts to be assessed within EIA documentation). This first and most important determination of the scope of the EIA cannot be influenced by affected municipalities or affected citizens. The competent government authority has a limited right to influence the scope of an EIA, yet this right occurs only in the later stages of the EIA process.

During five years of applying the Czech EIA Act not a single officially organised public scoping process took place.

#### **2. The public has limited opportunities to inspect EIA documentation properly.**

EIA documentation is made available to citizens for 30 days for inspection, copying, and providing written submissions. The notification about the availability of EIA documentation for “public review,” however, is done only by putting an official announcement on the noticeboard of the specific authority — an information means that reaches extremely low proportions of local inhabitants. There is no requirement for public notification about EIA documentation in the local and regional media.

Citizens who managed to learn about the opportunity to inspect EIA documentation can have access to it at the designated office of the municipal administration and may provide written comments. Interested citizens can also make copies of EIA documentation, but only if they can afford the copying costs, which is usually not the case. Preparing written comments on EIA documentation — usually very complex and extensive documents — after a simple inspection at the office of the administration is an extremely difficult, if not impossible, task.

The combination of the above features of “public participation” makes the thorough public review of EIA documentation almost non-existent. The practice proves that interested citizens usually do not learn about their opportunities to inspect EIA documentation and even if they do learn about it — usually through very informal channels — they are not able to provide qualified comments on such complex expert material. Both the public as well as competent governmental and municipal authorities thus miss a key opportunity for proper public review that could be done in a timely and non-confrontational manner.

#### **3. Public comments that do not provide technical findings, but rather express values and general concerns, are not considered in the review of EIA documentation.**

EIA documentation and the public's comments are reviewed as part of the preparation of the expert opinion.



This expert opinion is prepared by an EIA consultant who has not take part in the preparation of EIA documentation that he or she is expected to review. This person is selected by the relevant government agency and directly paid by the developer. The consultant is not expected to evaluate concerns that are not of a strictly technical/scientific nature. Although the EIA Act requires a social impact assessment as part of EIA documentation, this requirement is largely ignored.

This leads to many EIA experts immediately judging non-technical concerns about the proposal as irrelevant, and concentrating on the technical comments provided by statutory consultant and NGOs, if they were able to present sophisticated arguments. Non-technical concerns of ordinary affected persons are openly ignored and this fact is acknowledged when the findings of the EIA expert opinion are presented to the public.

#### **4. Citizens are frustrated by the public hearing on the EIA expert opinion**

The structure of the EIA procedure forces citizens to provide their substantive comments at the last stage of the EIA process — within the public hearing on the proposed EIA expert opinion. Though this last stage of the EIA process openly reveals public concerns, it provides very limited opportunity to influence the whole decision-making process within the EIA. Comments raised during this public hearing — comments which relate to alternatives, and environmental or socio-economic impacts of the proposed development — cannot really be considered since the EIA process is in its final stage.

At the end of the EIA procedure, concerned and motivated citizens are left frustrated, and feeling that their comments were not considered in an appropriate manner. One of the major consequences of this kind of “public participation” in the Czech EIA system is thus growing public cynicism about the value of individual contributions towards environmental protection.

### **Parallel public participation in EIA — Basic principles**

Based on the above observations, the Public Environmental Assessment Centre (Plzeň), and later also the Centre for Community Organising (Plzeň), developed generic guidelines for organising parallel public participation in EIA. The methodology is based on a presumption that, if developers and state agencies fail to do so, NGOs can take the initiative and organise their own participation opportunities that would provide more favourable participation.

In practice, NGOs that learn (either through formal or non-formal channels) of the beginning of the EIA procedure can undertake specific steps.

#### **1. Organise local coalition of various local interests groups**

The NGO contacts local NGOs, local members of par-

liament and other groups (labour unions, church groups, etc.) in the affected municipality and asks them to jointly initiate a proper public debate about the proposed development. Local institutions supporting the idea can form an informal coalition of various local interest groups with the common aim to notify potentially affected citizens in detail about the proposal and invite citizens, external experts and the local media to the parallel public participation opportunity.

#### **2. Organise parallel commenting within the EIA process**

The local coalition can easily organise parallel public hearings, which can be initiated at any stage of the EIA procedure. Such hearings can effectively consider the scope of EIA documentation (scoping meeting) or EIA documentation itself.

The local coalition invites the proponent and the expert who prepared the EIA report and asks them to present their findings to the public. If they do not accept the invitation, the coalition or NGO presents the documents about the proposed activity and the EIA findings itself. The hearing is typically focused on:

- health impacts;
- ecological impacts; and
- socio-economic impacts.

The presentation of each category of impacts is followed by thorough public questioning and submission of comments. All comments are recorded and, if necessary, voting takes place to show the level of support for the comment among participating members of the public.

The coalition can also prepare an interactive EIA exhibition, including a series of posters summarising key information about the proposal and can exhibit this at the entrance to the venue place where the hearing is held. Newcomers to the process can thus quickly learn about the discussion and provide immediate comments. The exhibition also provides important background information during breaks in the public hearings.

#### **3. Submit public comments as part of the official submission process**

The comments gathered during the parallel public participation process are provided to the authorities in the form of an official submission.

#### **4. Initiate the social impact assessment process**

Social impact assessment (SIA) — potentially one of the most important tools for the evaluation of non-environmental concerns within the EIA procedure — is generally not used. SIA involves the examination of a proposed activity with respect to, among others, cultural, social, eco-

nomic or aesthetic concerns. The NGO or the local coalition can request an SIA or undertake one itself.

### C. Parallel public participation in EIA — Practical illustration

The above process has been tested on the proposed Recreational Park Rajchero. This proposal was initiated in early 1994 by a Dutch company that intended to build a large recreational park (270 hectares) in the middle of the south Bohemian woodlands. The proposal was backed by a promise to invest USD 100 million into this very poor region. The proposed development enjoyed very strong political support, mainly due to the personal involvement of the relatives of the local mayor as well as of the head of the Regional Office. It was further backed by explicit support in the local media, which responded positively to the large public relations campaign launched by the developer.

In spring 1994, the first information about the EIA study for the proposed development was leaked to the regional media. Local NGOs found that the proposed park would destroy the habitat of nine critically endangered and 27 endangered species and would have a major impact on the natural reservation that bordered the area of the proposed park. The location of the park — in the middle of a forest, without roads or infrastructure — would also have a major impact on the development of local infrastructure.

NGOs with very limited hope of successful participation in the EIA at the time, asked the Centre for Community Organising for help. A parallel public participation process was suggested as the most effective option. It resulted in the following concrete outcomes:

- Association Rajchero was formed, consisting of 42 local NGOs and local academic institutions that supported a detailed public review of the proposal.
- A total of six public hearings were held to review EIA documentation in all concerned local communities within the two-year EIA process.
- Three sociological surveys and a socio-economic assessment were prepared by the Association Rajchero in order to map and analyse general public comments about the proposal.

These outcomes proved to have numerous benefits for the NGOs that organised the process. In particular, it helped Association Rajchero to:

- obtain new data and expertise;
- identify (both from the attendance at the hearing as well as from the comments that were voiced) the general feelings of the community towards the proposal, — and make further moves based on this knowledge;

- identify key supporters and opponents of the Associations' actions; and
- gain substantial political power.

The parallel public participation process resulted in sufficient public pressure to cause the EIA process to be restarted three times — three versions of the EIA documentation were consequently produced by the developer. The developer was strongly backed by the local mayors and the regional administration, and resisted public pressure to withdraw from the project.

The whole EIA process lasted for more than three years. It resulted in more than 300 pages of public comments on the proposal.

### D: Parallel public participation in EIA — Further ideas

Parallel public participation in EIA works. The Centre for Community Organising also used this approach in urban transport planning in Plzen and Prerov where it proved to be successful in both instances. In both cases, EIA documentation was returned to be redone because citizens had an opportunity to express their concerns about inadequacies.

The Centre for Community Organising suggests that NGOs, instead of being involved with the elaboration of expert submissions in the EIA process, should systematically organise parallel public participation processes, including parallel public scoping and public hearings on EIA documentation. By doing so they take the initiative and establish a procedure that provides the public with far better opportunities to participate than the standard procedure. It also allows NGOs to control the public participation process and to play a part as the major organiser of public debate about the proposal, a position which gives them political support as well as additional information that they would never have been able to gather by their own means.

The systematic application of parallel public participation can be replicated in practically every EIA system, and it pays off. However, experts are needed as it must be professionally applied and systematically developed. Major NGOs that deal with EIAs are therefore encouraged to train their own experts to be able to use this procedure effectively.

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## Denmark: The ombudsman, an institution with far-reaching consequences

Source: <http://www.ombudsmanden.dk> (excerpts)

*Editor's note: The Nordic countries made a joint statement on the applicability of the ombudsman as a mechanism for access to justice under the Aarhus Convention during the convention negotiations. While not meeting all the formal requirements of the convention, the ombudsman can provide a quick, effective and inexpensive alternative means of achieving environmental justice in a given case.*

In 1953 the Danish Constitution included a provision that the Folketing (parliament) should elect at least one ombudsman. Motivated by the growing influence of the civil service, the aim was to create improved guarantees for “the proper exercise” of the state’s civil and military administration. The Constitution empowered the Folketing to lay down more detailed rules for the activities of this new institution.

The institution of the Danish ombudsman had its origin in the Scandinavian social structure of the 1950s. The relationship between citizen and state was predominantly governed by laws passed by the Folketing. The slow legislative procedure came under pressure from an increasingly complicated society, and gradually the Folketing had to leave more and more decisions to the public administration.

A crucial aspect of the institution of the ombudsman was that, from the very outset, the Folketing allowed the office to adapt to developments, thus preventing it from becoming set in a 1950s form of regulating relations between state and citizens. The intention is to adapt the ombudsman and his functions to the latest developments in the relationship between the public administration and citizens. If the ombudsman’s control is to be effective and beneficial to citizens, it must be extended to all authorities that regulate the circumstances of citizens.

### Between Folketing, public administration and citizens

The Danish ombudsman occupies a position midway between the Folketing, the public administration/ministers and citizens. With limited legal powers, the ombudsman is supposed to ensure the “proper exercise” of administrative powers. To understand how it was possible for the ombudsman to become an important part of Denmark’s judicial setup, it is necessary to look at the post’s relationship to the Folketing, the public administration and citizens.

### The ombudsman and the Folketing

After each election, the new Folketing elects an ombudsman who is to “oversee the administration” on its behalf. The Folketing may dismiss the ombudsman if it loses confidence in him or her, but this has never occurred.

The ombudsman has to report to the Folketing, both in the form of an annual report, and in connection with specific cases of errors or deficiencies of major importance. Furthermore, the Folketing lays down the general provisions governing the ombudsman’s activity.

On the other hand, the Act states that the ombudsman is independent from the Folketing, for instance, when deciding whether complaints are to be subjected to actual investigation. The ombudsman is not allowed to be a member of the Folketing. He hires and fires his own staff and he may request to be relieved of office at six months’ notice.

Formally, the ombudsman has limited powers. The Folketing was unwilling to bring in an institution that could defer or alter the decisions of the public administration. The ombudsman’s supervision is subsequent, and the office’s true power springs from its relationship to the Folketing.

Furthermore, the Folketing has largely delegated the task of giving substance to the concept of “the proper exercise of administration” to the ombudsman. Through comments, the Ombudsman has tried to develop general basic principles for the correct exercise of administration. The ombudsman has laid down requirements for the handling of cases and these have later been incorporated into Danish Administration Acts. The ombudsman has also indicated how the public administration is to arrange its work so that the processing of cases does not drag on unnecessarily, as well as generally how the administration ought to act to strengthen its relationship of trust with citizens.

In interpreting laws, the ombudsman has always stressed the intentions of the Folketing. Great importance has also been attached to human rights and the Danish Constitution. In specific cases, the ombudsman had an opportunity to express an opinion about the general practice of Danish government agencies. In a case concerning Jehovah’s Witnesses, the ombudsman pointed out that, in areas covered by constitutional law, there is a duty upon the authorities when using their discretion to take into account citizens’ exercise of their liberties and, to the greatest extent possible, to avoid placing obstacles in the way of liberty.

### The ombudsman and citizens

Although the Act refers to the parliamentary ombudsman, it is in many contexts more appropriate to speak of the citizens’ ombudsman.

For citizens, the protection provided by the ombudsman is primarily in freedom to complain. It costs nothing, and there are very few conditions to be met. Decisions must be final before a complaint can be made, and complaints, which must not be anonymous, must be submitted to the ombudsman within one year.

The ombudsman decides whether to actually investigate a complaint and, if so, what to investigate. In other words, the ombudsman is not bound by the complainant’s allegations. The ombudsman then starts to proceed in the matter, unless the complaint is groundless or trivial, assess-



ing the complaint and the prospects for being able to help the complainant. If there is no such prospect and, in addition, there is no sign that the authorities have dealt with the matter wrongly or have made an incorrect decision, the ombudsman may dispense with the lengthy process of asking the authorities for a statement. The ombudsman then writes directly to the complainant explaining why no further action is being taken in the matter.

After deciding to investigate a case, the ombudsman sends the complaint to the authority concerned asking for the relevant documents to be sent along with a statement. The complainant is given an opportunity to comment on the statement from the authority, after which the case is ready for the ombudsman's assessment. Citizens may be given free legal aid if litigation is inevitable and their income is low.

### **The ombudsman and the public administration**

The public administration primarily interacts with the ombudsman during the investigation of complaints. Through these complaints, the authorities are given the opportunity to get a thorough and impartial legal appraisal of their decisions, their handling of cases, and the administration in general. The ombudsman's efforts to develop general principles for public law have proven to be important to the public administration.

### **Investigations made on the ombudsman's own initiative**

The Folketing has given the ombudsman the liberty to initiate investigations independently. In these cases, where there is no complaint by a citizen, the ombudsman may have identified issues in the public domain, sometimes as a result of press reports, which require closer investigation. In 1993, "own initiative" investigations totalled 139.

"Own initiative" cases may aim to investigate whether it is necessary to help a citizen in a particular case. The opportunity to initiate cases has been used by the ombudsman, particularly for investigating more general questions or issues of principle that complaint cases do not necessarily raise. In this way the ombudsman has had the opportunity to keep track and influence the general development of relations between the administration and citizens. In recent years, "own initiative" investigations have been extended in a way that meets the need for general investigations to a greater degree.

For example, in 1988 the ombudsman asked the Department of Private Law for access to 70 files. The Department of Private Law deals with administrative matters concerned with, for instance, separated and divorced parents' access to their children and with possible maintenance obligations. In these 70 cases, the authorities had made almost 150 decisions.

The ombudsman's investigation was concluded with a

full report of 130 pages. Citizens, the Department of Private Law and other authorities were able to read about the ombudsman's scrutiny of the legal problems and issues involved. The ombudsman also made conclusions about the way the authorities had dealt with the cases and about their procedure in general.

The report concluded that the Department of Private Law had decided the cases in accordance with the spirit and letter of the law, and that the administration had made an effort to make allowance for the personal situation of the parties as was required in cases of this character. The report was well received by the public administration and by politicians, and projects of this kind have since become an important part of the ombudsman's input.

## **Estonia: Estonian Society for Nature Conservation and Estonian Green Movement v. the Ministry of Economy**

Source: Press release (edited)

*Editor's note: This case, started too late to be included in the case study section, is one of the first to seek to apply the Aarhus Convention directly in a court of law.*

March 27, 2002, Tallinn

A court case began today in the Tallinn Administrative Court between two environmental NGOs, the Estonian Society for Nature Conservation and Estonian Green Movement, and the Ministry of Economy.

The essence of the case is the inactivity of the Ministry, which refuses to carry out an environmental impact assessment of the Action Plan for Estonian Oil-shale Based Energy for 2001-2006. According to Estonian law the assessment should be done for any big programme that could have nationwide or regional environmental impact.

The most significant is that the Court has agreed to begin the procedure on the basis of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The court recognised that, according to the convention, the environmental NGOs would not have to prove that their rights or interests have been violated.

Most probably this court case is a world precedent, because the Convention only entered into force on October 30, 2001. It should be mentioned that only two European Union countries have ratified the convention to date.

The fact that the Court agreed to process the case on the basis of the Convention, does not mean victory yet. Discussion about the interpretation of the law will

follow whether or not the verdict will need proof of the violation of the rights of the NGOs. This will be the next step in creating a precedent.

## European Commission: Appeal of Friends of the Earth to the European ombudsman

Source: Peter Roderick, Friends of the Earth

In 1999, Friends of the Earth asked the European Commission (DG XI) for copies of two studies that had been conducted for the Commission into the UK's transposition of the habitats directive and various waste directives. The Commission provided copies of the studies, but with page after page blacked out in thick ink.

Friends of the Earth appealed to the secretary-general of the Commission, as required by the Code of Conduct concerning public access to Commission and Council documents attached to Commission Decision 94/90/EC. The secretary-general upheld the Commission's refusal to provide full copies.

The argument of the Commission was that the documents fell within the exception of "protection of the public interest (court proceedings, inspections and investigations)." In respect of the study on waste directives, DG XI also argued that the exception "for the protection of the Commission's interest in the confidentiality of its own proceedings" applied, but the secretary-general dropped this argument.

In 2000, Friends of the Earth appealed to the European ombudsman against these refusals. It argued that the documents were studies, not investigations, and that the democratic accountability of the Commission meant that the public should be entitled to see an objective independent study on compliance with environmental law conducted for it. It also argued that the Commission was acting inconsistently with the Aarhus Convention.

In March 2001, the ombudsman ruled that the Commission was guilty of maladministration in refusing to provide full copies of the report and gave the Commission until June 30, 2001 to respond. The ombudsman ruled that "it is reasonable to regard these reports as Commission documents, to which the rules of Decision 94/90/EC should apply," and went on to state as follows:

"An interpretation of the scope of 'inspections and investigations', as suggested by the Commission, could preclude public disclosure of any document held by the institution which might be relevant for its role of guardian of the treaty under Article 211 of the EC Treaty. Accordingly, whole categories of documents whose content relates to member states' compliance with Community law, and hence which may give fac-

tual or legal elements to the Commission in order to consider instituting infringements in the future, could be barred from public access ...

The Ombudsman therefore considers that the exception based on inspections and investigations should only be applied when the requested documents have been drawn up in the course of an investigation connected to an infringement proceeding. The two reports in this case were commissioned prior to any investigation, and with a view to solely considering the options available to the Commission (paragraphs 2.6 and 2.7)."

### Further information

The ombudsman's press release can be found at: <[www.euro-ombudsman.eu.int/release/en/2001-03-20.htm](http://www.euro-ombudsman.eu.int/release/en/2001-03-20.htm)>. The ombudsman's draft recommendation can be found at: <[www.euro-ombudsman.eu.int/recommen/en/000271.htm](http://www.euro-ombudsman.eu.int/recommen/en/000271.htm)>.

This case illustrates the continuing democratic deficit in the Commission, and the importance of the public continuing to seek to hold it accountable.

## Court of Justice of the European Community: Stichting Greenpeace Council et al v. European Commission (C-321/95P)

The European Commission decided to finance the construction of two fossil-fuelled power stations on the Canary Islands. A group of applicants, including Greenpeace, brought an action under article 230(4) of the EC Treaty, contesting the legality of the operations in Spain, as no EIA had been conducted as required by EU law. The applicants pointed out that the Commission was restricted from financing activities that contravened Community legislation and policies under article 7 of Council Regulation 2052/88.

The Court of First Instance, Case T-585/93, [1995] ECR II-205, ruled that the applicants had no standing to bring an action under article 230(4) as they had no individually recognisable concern distinguishable from that of the whole community. The Court ruled that an association could contest a Community act only if it represents individuals who themselves fall under the scope of article 230(4), or if special circumstances exist that sufficiently individualise the association.

On appeal before the Court of Justice, Case C-321/95, [1998] ECR I-1651, the applicants claimed that the test used by the Court of First Instance should not be used in cases relating to environmental matters, as the environment is a common good. Alternatively, they argued that the right to be informed and to participate in an EIA procedure, which

had been abrogated under the circumstances of the case, gave them an individual right to go to court. The Court did not accept these arguments, upheld the decision of the Court of First Instance, and furthermore stated that the rights under the EIA directive would be fully protected by the national courts of Spain.

The Greenpeace case met with substantial criticism. For a summary of the issues involved and a discussion of the questions raised, see *Report: Complaint procedures and access to justice for citizens and NGOs in the field of the environment within the European Union* (Tilburg Univ, MinVROM Netherlands, April 2000), pp 37-40.

## France: French NGO celebrates Natura 2000 court ruling

Source: Environment Daily 1029, July 12, 2001

*Editor's note: This case could potentially fall under Aarhus Convention article 9(3) and involves an attempt by a French NGO to overturn a decision in contravention of EU environmental law.*

France's highest administrative court has blocked development of a Natura 2000 candidate site in Alsace. The ruling, announced on Wednesday, represents the first time that the French legal system has recognised the jurisdiction of the 1992 EU habitats directive.

The ruling suspends authorisation granted earlier this year by the agriculture ministry to plant vines at a site in the High Rhine region and is being interpreted as a blow to various parties, including hunters and landowners, who have been fighting the Natura 2000 process.

The agriculture ministry argued that development plans should not be blocked because the site in question is one of several hundred whose nomination for inclusion in the EU-wide Natura 2000 conservation network was recently struck down on a technicality (ED 25/06/01 <[www.environmentdaily.com/articles/index.cfm?action=article&ref=10165](http://www.environmentdaily.com/articles/index.cfm?action=article&ref=10165)>).

The court dismissed this argument, concluding that the scientific basis of the environment ministry's site nomination was sound, and therefore the technical hiccup in the nomination process was not of consequence.

The case was brought by France Nature Environnement (FNE), a network of environmental NGOs. An FNE spokesperson told *Environment Daily* that the ruling was an important step toward improving France's implementation of the habitats directive.

## Contacts

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The press release may be found at <[www.france-nature-environnement.org/pdf/CP2%20conseil%20natura2000.pdf](http://www.france-nature-environnement.org/pdf/CP2%20conseil%20natura2000.pdf)>.

## Hungary: The protected forests case

Source: S. Stec, work in progress (footnotes omitted)

*Editor's note: This case is an example of the role of jurisprudence in particular cases brought by NGOs and environmentally aware members of the public, in the development of interpretations of environmental rights. It is relevant to article 9(3) of the Aarhus Convention.*

The protected forests case before the Constitutional Court of Hungary had its origins in the process of privatisation of nationalised property following the changes in 1989. In 1992 the Hungarian parliament passed a law on the privatisation of agricultural land that contained provisions concerning the break-up of agricultural cooperatives and the distribution of land to their members. The law provided for various exceptions to what was to be privatised. Non-privatisable lands included national parklands, areas protected by international agreement, and other protected natural territories, unless such lands were already under certain forms of cultivation. Those forms of cultivation that put protected lands back into the privatisable category included many forms of agriculture and viticulture, but did not include cultivated forests. Farmers who wished to gain ownership of cultivated forests under the regime reacted to the legislation by lobbying for inclusion of cultivated forests among the types of cultivated lands that could be privatised even while protected. Parliament gave in to the farmers and amended the law to allow cultivated forests to be privatised as well. This prompted a group of unnamed citizens to petition the Constitutional Court to declare that the amendment to the law violated the two environmental rights found in the Hungarian Constitution.

The first of these constitutional provisions, article 18, was a conventional declaration of the right to a healthy environment. The second, article 70/D, provided for a human right to the highest possible level of physical and spiritual health. In a well-reasoned decision, the Hungarian Constitutional Court interpreted these two constitutional rights as "third-generation" constitutional rights. Taken together they were declared by the court to be neither collective nor individual rights. While not basic rights, neither did they simply impose a constitutional task on the state that the state could implement freely as it wished. In choosing the term "third generation constitutional right," the court drew an analogy to the right to life on the basis that environmental resources are limited, most environmental dam-

age is irreversible and the environment is the basis for all life. Articles 18 and 70/D must therefore be interpreted, in the opinion of the court, in a way that places an obligation on the state to provide legal and institutional guarantees for an objectively high level of environmental protection. Thus, if the state guarantees a certain level of environmental protection at any time, it cannot be withdrawn arbitrarily. Such protections could only be diminished in proportion to upholding other constitutional rights or values. This furthermore implied, in the court's view, that the rights found in the Constitution, in an appropriate case, could be the basis of a cause of action to require the state to maintain high objective standards of environmental protection.

In the case at hand, the interest of the members of the cooperative to receive compensation through ownership was not comparable to the interest in protecting the forests. The court did mention that the ownership of the forests was not the key issue. In principle the forests could be privatised, but if so the obligations of the owners would need to be strengthened, and the state would have to continue to guarantee the objectively high level of protection of the forests. The fact that no provision had been made in the amendments to offer such a level of protection once the forests passed into private hands was evidence that the state had failed in its basic responsibility of ensuring an objectively high level of environmental protection. Thus, the court invalidated the amendments.

The opinion distinguished between an individually enforceable basic right and its "opposite" — an affirmative but generalised duty of the state. But it did more than this, asserting a "third way," the third generation constitutional right that gives some constitutional substance to the state duty — that is, some oversight by the people over how the duty is carried out. The right to a healthy environment, according to this view, is "actually the right of an individual to demand the maintaining of ecological standards, set up by law." Through appeal to such third generation constitutional rights, the public thus may influence particular objective means for environmental protection in various ways. These include direct challenges to the constitutionality of laws as in the present case, but also in other ways, such as participation in environmental decision-making and standard-setting by authorities.

The Hungarian Constitutional Court has extremely liberal standing rules. Any individual may bring an action before the court to challenge the constitutionality of an existing or newly enacted law at any time, regardless of case or controversy requirements. In this case the initiator of the suit — an unnamed group of environmentalists — stood far in the background of what was in fact a declaratory judgment. In other jurisdictions, standing can be an issue requiring intensive scrutiny. Hungary's open standing provision allows for quick, direct and inexpensive access to the Constitutional Court.

## **Hungary: The ombudsman as a tool for access to justice using an independent and impartial body established by law**

Source: Magdolna Toth Nagy, Regional Environmental Center for Central and Eastern Europe

In Hungary, Act LXIII of 1992 on the Protection of Personal Data and Disclosure of Public Interest established the institution of the data protection commissioner (or ombudsman) to protect the constitutional rights of citizens to the protection of personal data and to oversee the disclosure of data of public interest. The ombudsman is elected by the parliament for a period of six years. The first election took place in 1995, the second in 2001. The ombudsman's duties include, *inter alia*, the monitoring of the implementation of laws on data-processing and of the conditions for the protection of personal and public interest data. The ombudsman must also give opinions or present proposals on draft legislation or the modification of legislation related to data protection or freedom of information. His opinion is also sought for each category of official secrets, observing whether or not the processing of data is unlawful and, if so, requesting the data controller to discontinue the processing of the data. The data controller is obliged to take the necessary measures without delay and to inform the ombudsman in writing and publicly within 30 days of the occurrence of unlawful data-processing, the identity of the data controller, the categories of data processed and the status of the unlawful processing. He or she also examines any complaints lodged, and is entitled to change the classification of secrets, to request information on any matter, and to inspect any documents and records. The authorities have to report annually to the ombudsman on requests for information that have been denied and the reasons for such refusal.

Anyone may approach the ombudsman with a claim that his or her rights were violated through the processing of personal data, or through access to data of public interest, or in the case of a potential violation, except when a particular case is in the course of judicial procedure. If his or her request or appeal is refused, the applicant may still appeal to the court.

The opinions or recommendations of the ombudsman are not legally binding. However, they constitute an important tool to remedy infringements of rights to public access to information. The authorities responsible for handling the data or information are obliged to cooperate with the ombudsman to remedy an unlawful situation. If they do not cooperate, the ombudsman has a right to appeal to their higher level administrative authority. Through making unlawful actions or activities public, the ombudsman also uses the tool of transparency and publicity to put pressure on those not respecting the legal requirements in



question. The advice of the ombudsman is usually followed by measures taken by the public authorities: for example, correcting the unlawful acts or activities or amending their regulations and laws. If the advice is not followed, the unlawful act may be challenged in court.

In the past five years, the ombudsman has been asked several times to give an opinion about the interpretation of “public interest information.” Some of these cases are briefly described below. The recommendations suggest a practice that is governed by a presumption in favour of the disclosure of information.

### Recommendations on handling data related to environmental protection fines

In 1997, a group of citizens lodged complaints with the ombudsman regarding an information request on data related to environmental protection fines levied by environmental inspectorates. The applicants requested information from 12 local inspectorates, employing an identical request for the total amount of fines levied in 1997, how the money was spent, the names of the fined companies, and the amount of the fine imposed in each case. The responses, however, were quite diverse. The majority of the inspectorates declined to supply some of the data, either without specifying any legal grounds for the refusal or citing the civil code on personal rights and referring to business secrets. The entirety of the information was disclosed only by one authority. The fees charged for supplying the data also varied to a maximum of 1,500 percent.

The ombudsman, based on Act No LXIII of 1992 on the Protection of Personal Data and Disclosure of Public Interest, made it clear in his findings that the requested environmental information was “data of public interest” that could be disclosed to anyone. He stated:

“[B]usiness secrets” mean any fact or information ... related to the management of business affairs which the parties concerned have an appreciable interest in keeping confidential .... The business secret is a legal instrument in the service of protecting fair competition. The accessibility of information on hazards caused by violating environmental protection regulations ... forms an integral part of the constitutional freedom of information. The public disclosure of a well-defined range of pertinent information is of vital interest. The decisions of bodies charged with monitoring the legality of business enterprise constitute data of public interest. Information relevant to activities violating provisions in force and inflicting serious damage on the environment amounts to “certified public data” not simply because such activity may have an impact on the population irrespective of national borders ... but also because in a remarkable number of cases it implies irreversible harm or damage

that can only be repaired at an extraordinary cost. Citing business secrets should not be allowed to give immunity to those guilty of violations.

In his recommendation, the ombudsman proposed that the National Environmental Inspectorate and the 12 regional environmental inspectorates should regularly publish or make publicly accessible the list of those companies causing damage to the environment, including the type of pollution and the amount of fines imposed. Since the regional inspectorates have to report every quarter to the central authority on such activities and on the fines imposed, this information is available. Consequently, when supplying this information, they should not charge a fee in excess of covering copying and mailing costs. The Ministry of Environmental Protection and Regional Development and the local governments are obliged to provide information on the spending of collected fines periodically, as well as upon request.

### Recommendation on the publicity of concession contracts

Another example was related to a submission of an NGO (the Hungarian Automobile Club's Legal Protection Committee) on whether the information contained in a concession agreement constituted data of public interest. The contract, signed by the Ministry of Transport, Telecommunications and Water Management and the First Hungarian Concession Motorway Rt. (ELMKA), involved the construction and operation of the M1/M5 motorway. The applicant believed that the business interests of either the ministry or the company could not take precedence over the interests of disclosure.

The ombudsman asked the minister of Transport, Telecommunications and Water Management to explain his position on the issue. On behalf of the minister, the administrative state secretary explained that the concession agreement was an institution of public law. As such, it could not be regarded as data, and did not fall under Act LXIII of 1992. In the official's view, concession agreements were governed by the same rules that apply to any other type of contract: the information contained in them can only be disclosed to a third party when there is no contrary provision in the contract. The motorway tender contract included a provision that the information contained in it was a business secret.

The ombudsman emphasised that the right to access data of public interest and the right to freedom of information are fundamental constitutional rights. Citizens and their organisations cannot monitor local government functions unless they are in possession of an appropriate measure of information on how they are run. The right to access data of public interest and the right to the protection of business secrets may come into conflict when public bodies enter into business relations with private companies. Thus, in

their management of public funds, the bodies of the state and local government often come into possession of business secrets. In such cases priority must be given to disclosure to the extent that it allows for transparency in the use of public funds. Private companies applying for funds or entering into any other business transaction with the state or local government that involves public funds, have no choice but to accept restrictions on their business secrets.

The ombudsman proposed clarifying amendments to the Concessions Act that would make it clear to all parties to the concession procedure, including bidders and bodies of state or local government, which data they are liable to disclose.

The ombudsman invited the minister of Transport, Telecommunications and Water Management to guarantee to the plaintiff and any other interested person the opportunity to inspect the terms of the concession agreement in question.

### For further information

See *Cases of freedom of information: The first three years, 1998*, and *Act No LXIII on Protection of Personal Data and Disclosure of Data of Public Interest* on the website of the Hungarian ombudsman at <www.obh.hu>.

## Italy/Council of Europe: Guerra v. Italy, European Court of Human Rights

Source: ECHR case summary (edited)

*Editor's note: Judicial interpretation of the right to respect for private and family life on the European level has brought it increasingly close to interpretations of the right to a healthy environment on the national level (see, for example, the protected forests case).*

The case concerned article 8 of the European Convention on Human Rights and a family who lived in the vicinity of an industrial facility that produced fertilisers. Authorities failed to respond to several requests for information concerning the environmental risks faced by the family. The court held that the inactivity of the authorities violated the right to respect for private and family life protected by article 8.

The Ministry for the Environment and the Ministry of Health had jointly adopted conclusions on the safety report submitted by the factory. They had provided the prefect with instructions about the emergency plan, which he had drawn up in 1992, and measures required for informing the local population. However, the district council concerned had not received any document detailing the conclusions by December 7, 1995.

In this case, the applicants had waited until production of fertilisers had ceased in 1994 for essential information that would have enabled them to assess the risks they and

their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

In its decision, the Grand Chamber of the European Court of Human Rights held that severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way that would affect their private and family life adversely. The direct effect of toxic emissions on the applicants' right to respect for their private and family life meant that article 8 was applicable.

Applicants complained not of an act by the state but of its failure to act. As the objective of article 8 was essentially that of protecting the individual against arbitrary interference by public authorities, it did not merely compel the state to abstain from such interference — in addition to this primarily negative undertaking, there might be positive obligations inherent in effective respect for private or family life.

In the present case all that had to be ascertained was whether national authorities had taken the necessary steps to ensure effective protection of the family's right to respect for its private and family life. The court unanimously concluded that the respondent (the state) had not fulfilled its obligation to secure the applicants' right to respect for their private and family life.

## Romania: Saran v. Public Health Inspectorate of Dambovită

Source: original court record

*Editor's note: The Aarhus Convention, with its broad definition of environmental information, may help to shift the burden of establishing what is public information from the member of the public, as exemplified by this case, to the authority refusing to disclose the information.*

Dambovită Tribunal, Section for Commercial and Contentious Administrative Matters, Decision No. 759, April 30, 2002:

Petitioner Teodor Saran of Targoviste brought a case against the defendant, the Public Health Directorate of Dambovită, complaining that his right to free access to information of public interest was violated by the defendant's refusal to provide information on request. Petitioner requested a copy of the original sanitary authorisation of the functioning of the source of drinking water in Ratei, county of Dambovită, by the Commercial Company for Communal Housing and Transport Management, pursuant to provisions of articles 3 and 6, and other provisions of Law No 544/2001 and the Constitution.

The answer given by the defendant (by letter) was that it does not communicate such information "upon the request of natural persons." Moreover, the authorisation of functioning is an administrative document of an individual

nature and does not belong to the category of information of public interest.

The court held that information of public interest means any information that regards the activities or results from the activities of a public authority or a public institution, irrespective of the form, means or manner of expression of the information. Such information is listed in article 5 of the law, which does not provide the cases in which a request is made for the issuing of authorisations, supplies of services and any other requests except information of public interest.

Because issuing a copy of the original of the sanitary authorisation of functioning does not belong to information of public interest, the tribunal rejected the petitioner's request.

## Slovenia: Constitutional Court case brought by the National Association of Ecologists

Source: Milada Mirkovic, lawyer

*Editor's note: The Slovenian Constitutional Court recognised the standing of an environmental NGO and individuals to challenge the legality of a development plan at least in part upon an interpretation of a duty to protect the environment. The case is a rare example of application of access to justice under article 9(2) of the Aarhus Convention with respect to optional provisions, in this case strategic environmental assessment under article 7, as well as article 9(3) (direct enforcement).*

(Decision No U-I-30/95-26, 1/15-1996). An NGO, Drustvo ekologov Slovenije, and 25 individuals began a procedure before the Constitutional Court for evaluation of the constitutionality and legality of a development plan of a small business/manufacturing zone in the hinterland of Lake Bled. The Court recognised the legal interest of the NGO on the basis of the Environmental Protection Act, article 4(3) (Official Gazette of the RS No. 32/93), which provides that the protection of the environment is, inter alia, the responsibility of professional and other NGOs for environmental protection. The Court held that the NGO was responsible for environmental protection under the law because it was defined in its statute as a professional association whose members are involved in expert work in the research of ecosystems and their protection, as well as in pedagogical work and activities on the popularisation of these issues.

The court recognised the legal interest of the individuals on the basis of the constitutional right to a healthy environment in which to live (Constitution, article 72). The Court held that every person has an interest in protecting the environment, and that this interest is not limit-

ed to the environment close to the place where he/she lives or to prevention of imminent harm.

The court invalidated the development plan of the small business/manufacturing zone in question because it found it was not in accordance with the territorial/spatial medium-term plan of the municipality and with the long-term plan of the state. There were also some procedural failures in the adoption of the development plan.

### Contacts

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## Spain: Spanish Court orders telephone mast removal

Source: Environment Daily 1020, June 29, 2001

"A Spanish mobile telephone operator is to appeal against a judge's decision last week ordering the removal on health grounds of a mobile phone transmitter from the roof of a residential building. Thought to be the first decision of its kind in the EU, the judgement made at a court in Bizkaia, northern Spain, requires mobile telephone operator Airtel to remove the equipment until it can demonstrate that the radiation emitted poses no health risks to residents in the building. The judge decided that 'reasonable grounds exist for suspecting that the radiation from the transmitter is not innocuous to people permanently exposed to its effects.' Residents had previously agreed to installation of the equipment in return for financial compensation from the company. A spokesperson for Airtel told *Environment Daily* that the company will appeal against the verdict 'to the Supreme Court if necessary to prevent the decision establishing a legal precedent.' A company statement described the decision as 'the first time in Europe a court has ordered the removal of a legally-installed transmitter.' A spokesperson for GSM Europe, which promotes international mobile telephone communication, said she had no knowledge of any other European court passing a similar judgement."

### Contacts

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## United Kingdom: R v. Sec of State for Env. Transport and the regions and Midland Expressway Ltd., ex parte Alliance Against the Birmingham Northern Relief Road and others

Queen's Bench Division, July 29, 1998

*Editor's note: This case concerned the applicability of commercial confidentiality rules under the Environmental Information Regulations of 1992. The question concerned a concession agreement for construction of a toll-financed road scheme that contained commercially confidential information. The court held that the agreement was "information relating to the environment" and that the fact that a document might contain genuine commercially confidential information could not be used to prevent disclosure of the main body of the agreement. Moreover, the court also determined that the applicant's purpose in seeking the information was irrelevant.*

## United Kingdom: R v. British Coal Corporation ex parte Istock Building Products Ltd.

Queen's Bench Division, October 21, 1994, 1995 Env. L. R p 277

*Editor's note: Gathering information during planning procedures can sometimes involve controversy. This case involved the identity of an informant who claimed that naval ordnance may have been disposed of in a mine shaft. The permit applicant contended that the identity of the informant was necessary in order to assess the credibility of the information. Initially, British Coal refused to identify the informant but did so after the permit applicant initiated a court action. The applicant then sought its costs, claiming that it was legally entitled to the information. The court held that the identity of the informant was not "personal information" held by the respondent and that it was important to assess the credibility of the information and its weight.*

## United Kingdom: The Salisbury bypass case

Source: Peter Roderick, Friends of the Earth

In 1996, the UK government was planning to build a controversial bypass around the historic city of Salisbury. Long after the public inquiry had finished, the Department of Transport carried out an "induced traffic assessment report" for the bypass. This report predicted how much extra traffic would be generated by building the new road.

Friends of the Earth asked the department for a copy of the report. The department refused, arguing that, among others, the report was not "environmental information" within the meaning of Directive 90/313/EEC and the UK's domestic transposing legislation.

Friends of the Earth therefore brought a judicial review against the department. In its sworn written evidence filed before the hearing, the official admitted that "after further legal advice ... I am advised that the induced traffic assessment is capable of falling within the scope of" environmental information. However, the department continued to refuse to provide a copy, arguing that the information related to a matter that had been the subject of a public inquiry (and so the *sub judice* exemption applied) and to confidential deliberations of the department.

Two weeks before the court hearing was due, the Department of Transport provided Friends of the Earth with a copy of the report, and the hearing did not proceed.

This case illustrates that public bodies can use several arguments to prevent the public from gaining access to information. In such cases, when faced by a court hearing, they often change their minds. It also shows that public bodies do not like the possibility of court judgments going against them and will, if pushed, disclose the information in advance to avoid a case being made in court.

## United Kingdom: The pesticides and GM crops case

Source: Peter Roderick, Friends of the Earth

In 2000, Friends of the Earth asked the UK government's Ministry of Agriculture, Fisheries and Food for certain information regarding consents for the spraying of glufosinate ammonium on crops genetically modified to be resistant to it. Some information was made available, but the ministry refused to specify what tests had been conducted or were relied upon in the consent applications "to establish the harmlessness of the herbicide to humans, animals, plants and the environment," and refused to disclose the full results of those tests. Article 14 of Directive 91/414/EEC concerning the placing of plant protection products on the market provides "without prejudice to council Directive 90/313/EEC" that "confidentiality shall not apply to ... a summary of the results of the tests to establish the substance's or product's efficacy and harmlessness to humans, animals, plants and the environment."

The ministry argued that the information was commercially confidential and that it had been voluntarily supplied.

Friends of the Earth wrote a letter before action to the ministry saying that it was entitled to the information under directives 90/313/EEC and 91/414/EEC. It pointed out that it was difficult to envisage the circumstances in which environmental information of the nature sought could be commercially confidential. It maintained that, as the company could



not have been given consent to spray the pesticide if it did not provide the information in question, it cannot properly be said that that information was supplied voluntarily.

The ministry responded that it no longer wished to argue that the information was voluntarily supplied, and that it was going to write to the company to ask why the information might meet the “strict test” of commercial confidentiality. At the time of writing, this was where the case lay.

The case illustrates that public bodies can use several arguments to prevent the disclosure of information, and

that in such cases the prospect of a court case is needed for them to change their minds, albeit currently only in part. It is also important to note that this was an extremely complex case because of the nature of pesticide legislation and the number of requests. It was only because Friends of the Earth is a large enough organisation to be able to afford legal advice that it was able to take the case so far. A smaller community group or individual would not have fared well. This underlines the need for a non-court appeal mechanism against refusals.



# Appendix D

## Important Contacts

### Ministries of Justice in UNECE Countries

#### ALBANIA

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Blvd. Deshmoret e Kombit  
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#### ANDORRA

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Ministry of Justice and Internal Affairs  
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#### ARMENIA

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Ministry of Justice  
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Federal Ministry of Justice  
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Website: [www.bmj.gv.at](http://www.bmj.gv.at)

#### AZERBAIJAN

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No Information

#### BELARUS

---

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---

Ministry of Justice  
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Website: [www.just.fgov.be/index2.htm](http://www.just.fgov.be/index2.htm)

#### BOSNIA AND HERZEGOVINA

---

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#### CROATIA

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#### **CZECH REPUBLIC**

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#### **FRANCE**

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#### **GREECE**

---

Ministry of Justice  
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#### **HUNGARY**

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#### **IRELAND**

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No Information

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#### LICHTENSTEIN

No Information

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#### MONACO

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#### NORWAY

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Ministry of Justice  
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#### MOLDOVA

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 Website: [www.ejpd.admin.ch/d/index.htm](http://www.ejpd.admin.ch/d/index.htm)

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**TURKMENISTAN**

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**UNITED STATES**

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 Washington, D.C. 20530-0001  
 Tel: +1-202-353-1555  
 E-mail: [AskDOJ@usdoj.gov](mailto:AskDOJ@usdoj.gov)  
 Website: [www.usdoj.gov](http://www.usdoj.gov)

**UZBEKISTAN**

No Information.

Website: see [www.gov.uz](http://www.gov.uz)

**Partner organisations**

**Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters**

Website: [www.unece.org/env/pp/](http://www.unece.org/env/pp/)

**Aarhus Convention Task Force on Access to Justice**

Website: [www.unece.org/env/pp/a.to.j.htm](http://www.unece.org/env/pp/a.to.j.htm)

**United Kingdom – Department for International Development (DFID)**

[www.dfid.gov.uk/](http://www.dfid.gov.uk/)

**United Kingdom – Department for Environment, Food and Rural Affairs**

Website: [www.defra.gov.uk/](http://www.defra.gov.uk/)

**Estonia Ministry of Environment**

Website: [www.envir.ee/eng/](http://www.envir.ee/eng/)

**ABA CEELI**

Website: [www.abanet.org/](http://www.abanet.org/)

**European Eco-Forum**

E-mail: [eco-forum@eco-forum.org](mailto:eco-forum@eco-forum.org)

Website: [www.eco-forum.org/](http://www.eco-forum.org/)

**ELAW**

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**GUTA Association**

Website: [www.ecopravo.lviv.ua/guta/](http://www.ecopravo.lviv.ua/guta/)

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**KOSOVO**

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# Appendix E

## Further Reading

- ABA Standing Committee. *Public Participation in Environmental Decision-making*. Ed. by E.C. Lichtenstein and W.T. Dunn. Washington, D.C.: ABA Standing Committee on Environmental Law, Division for Public Services, American Bar Association. 1994.
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## **THE REGIONAL ENVIRONMENTAL CENTER FOR CENTRAL AND EASTERN**

**EUROPE (REC)** is a non-partisan, non-advocacy, not-for-profit organisation with a mission to assist in solving environmental problems in Central and Eastern Europe (CEE). The Center fulfils this mission by encouraging cooperation among non-governmental organisations, governments, businesses and other environmental stakeholders, by supporting the free exchange of information and by promoting public participation in environmental decision-making.

The REC was established in 1990 by the United States, the European Commission and Hungary. Today, the REC is legally based on a Charter signed by the governments of 27 countries and the European Commission, and on an International Agreement with the Government of Hungary. The REC has its headquarters in Szentendre, Hungary, and local offices in each of its 15 beneficiary CEE countries which are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, FYR Macedonia, Poland, Romania, Serbia and Montenegro, Slovakia and Slovenia.

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